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Brief for the Appellant, United States: Fifteenth Annual Pace National Environmental Moot Court Competition

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MEASURING BRIEF*

Civ. App. No. 02-2003

IN THE UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

UNITED STATES, Appellant,
and
STATE OF NEW UNION, Intervenor,
v.
GOLDTHUMB MINING CO., INC.,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

Brief for the Appellant,
UNITED STATES

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* This brief has been reprinted in its original form.

QUESTIONS PRESENTED

I. Did the district court err in holding that "navigable water" as defined by the Clean Water Act, 33 U.S.C. § 1362(7), does not include Arroyo d'Oro when it is dry?

II. Whether Congress has Commerce Clause jurisdiction over dry waterbeds of intermittent streams that do not meet any traditional test of navigability (navigability in fact) and are not tributary to waters that meet any such test?

III. Did the district court err in holding that enforcement by a state without a permit program approved by the EPA under the Clean Water Act prevents EPA enforcement under the Clean Water Act, 33 U.S.C. § 1319?

IV. Did the district court err in holding that a state need not enforce using comparable authority to the Clean Water Act's administrative penalties provision, 33 U.S.C. § 1319(g) in order to prevent EPA enforcement under 33 § U.S.C. § 1319?

V. Did the district court err in holding that a state penalty assessment that prevents EPA penalty assessment under 33 U.S.C. § 1319(g) also prevents EPA from seeking injunctive relief?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

UNITED STATES SUPREME COURT:

UNITED STATES COURT OF APPEALS DECISIONS:

UNITED STATES DISTRICT COURT DECISIONS:

UNITED STATES DISTRICT COURT DECISIONS:

STATE STATUTES:

FEDERAL REGULATIONS:

LEGISLATIVE MATERIALS:

REGULATORY HISTORY MATERIALS:

ADMINISTRATIVE MATERIALS:

LAW REVIEWS:

MISCELLANEOUS:

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The constitutional provisions relevant to the determination of this case are the Commerce Clause, Article I, Section 8, Clause 3, and the Necessary and Proper Clause, Article I, Section 8, Clause 18. Both clauses are reprinted in Appendix B. The statute relevant to this case is the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387 (1994). The relevant portions of the CWA are reprinted in Appendix B. A number of Environmental Protection Agency ("EPA") regulations are also relevant to this case and are set forth in Appendix B. The Order from the District Court of New Union is set forth in Appendix A as the Record on Appeal.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This is an appeal from an order entered on July 15, 2002, in the United States District Court for the District of New Union on Defendant's motion for summary judgment. The district court dismissed the action initiated by Appellant United States, on behalf of the EPA, against Appellee Goldthumb, Inc. ("Goldthumb") seeking civil penalties and injunctive relief under the administrative penalties provision of the CWA. The district court justified its grant of summary judgment against the United States on the following grounds. First, the court held that although the CWA confers jurisdiction to the United States over discharges into navigable waters, the regulatory definition of navigable waters does not include the Arroyo d'Oro ("Arroyo") when it is dry. The court did not reach the constitutional question of whether Congress lacks authority under the Constitution to exercise jurisdiction over discharges into the Arroyo when it is dry. Next, the Court held that 33 U.S.C. § 1319(g) of the CWA bars an action by the United States because New Union had already enforced against these violations under comparable state law.

The district court granted a motion to intervene by New Union. New Union acts as an Appellant in this case, challenging the district court's refusal to grant the United States jurisdiction over discharges into the Arroyo. However, New Union supports the district court's conclusion that the United States is barred by enforcement actions already taken by New Union. Thus, the United States and New Union join each other in opposing the district court's ruling on the jurisdictional grounds, while the United States opposes the district court's ruling on the preclusive effect of the statutory bars. Goldthumb supports the judgment in its entirety.

II. STATEMENT OF THE FACTS

The Arroyo is a normally dry riverbed that runs from the State of New Union to the State of Progress after major storms. Record on Appeal ("R.") at 1, 4. The Arroyo's waters travel over forty miles to reach Progress and feed into Greenheaven, a three-acre pool that is home to the endangered Greenheaven pupfish ("Pupfish") and protected as part of Progress's Greenheaven Wildlife Preserve ("Preserve"). R. at 4-5.

Goldthumb is a gold mining company that drains cyanide-laden wastewater into the Arroyo during monsoon season to prevent overflow of its evaporation ponds. R. at 4. These ponds store cyanide baths made up of cyanide, heavy metals, and groundwater pumped from several hundred feet underground. Id. Goldthumb admits that it drained these pollutants into the Arroyo on three separate occasions while the Arroyo was dry: three days in June 1999, one day in July 2000, and two days in July 2002. *Id.*

In April 2000, prior to draining the wastewater into the Arroyo in July 2000, New Union, through the New Union Department of Environmental Protection ("NUDEP"), issued its first administrative order to Goldthumb. R. at 5. NUDEP's order prohibited Goldthumb from discharging the contaminated liquid into the Arroyo at any time without NUDEP permission and when the Arroyo is wet. *Id.* Although Goldthumb challenged NUDEP's authority to control the discharge onto the Arroyo while it was dry, Goldthumb agreed to inform NUDEP before it discharged waters into the Arroyo. *Id.* Thus, in July 2000, Goldthumb contacted NUDEP and requested permission to drain some of the liquid into the Arroyo. *Id.* NUDEP sent an inspector who granted Goldthumb permission to discharge waters into the Arroyo and remained on-site, supervising the draining of the pond liquid into the Arroyo. *Id.*

In April 2001, NUDEP issued its second administrative order to Goldthumb, again prohibiting the discharge of contaminants when the Arroyo is wet and prohibiting discharge at any time without NUDEP permission. *Id.* Just a year later, in July 2002, Goldthumb asked NUDEP for permission to drain liquid into the Arroyo. *Id.* Once again, NUDEP sent an inspector to the ponds, who concluded that the Arroyo was dry and that the ponds were in danger of overflowing. *Id.* Thus, Goldthumb was again permitted to drain wastewater into the Arroyo. *Id.* Following this inspection, NUDEP informed Goldthumb that it would issue a third order similar to the previous two orders. *Id.*

STANDARD OF REVIEW

A court reviews a grant of summary judgment *de novo*. *Butler v. City of Prairie Vill.*, 172 F.3d 736, 745 (10th Cir. 1999). The facts are to be examined and reasonable inferences drawn in a light *most favorable to the non-moving party*. *Butler*, 172 F.3d at 745. If no genuine issue of material fact exists, the reviewing

court determines whether the lower court correctly applied the substantive law. *Id.*

When evaluating a constitutional challenge to a federal statute, a court applies a *de novo* standard of review. *United States v. Luna*, 165 F.3d 316, 319 (5th Cir. 1999). A court uses the following standards to review a challenge to the validity of a congressional exercise of power under the Commerce Clause: "(1) whether a rational basis exists for finding that the regulated activity affects interstate commerce, and (2) whether the means chosen by Congress were 'reasonably adapted to the end permitted by the Constitution.'" *Deer Park Indep. Sch. Dist. v. Harris County Appraisal Dist.*, 132 F.3d 1095, 1098 (5th Cir. 1998) (quoting *Hodel v. Va. Surface Mining & Reclamation Assoc.*, 452 U.S. 264, 276 (1981)). "The burden for the challenger . . . is high." *Id.*

SUMMARY OF THE ARGUMENT

The Court should reverse the district court's grant of summary judgment to Goldthumb, Inc. on all four issues, determine the constitutional issue in favor of the United States, and remand this case for further proceedings.

First, the district court erroneously determined that the definition of navigable water under the CWA does not include the Arroyo. The district court's decision leads to an absurd result because it requires an illogical bifurcation of the CWA. Furthermore, including the Arroyo under the CWA does not exceed the limits of the Commerce Clause—Goldthumb's pollution of the Arroyo substantially affects interstate commerce, as determined by the four-factor test set forth in *Morrison*.

Second, the Supreme Court has previously recognized that the "navigable waters" test does not limit Congress's authority to control pollution under the Commerce Clause. *SWANCC* does not control the question posed by this Court. Its holding is narrow: *SWANCC* did not strike down any part of the CWA, nor any part of the regulations affected by the Migratory Bird Rule. Furthermore, *SWANCC* did not overrule case law that interprets the reach of the CWA broadly. Thus, Congress's power to regulate intermittent interstate streams, even when dry, is limited only by the reach of the Commerce Clause, and not by any test of navigability.

Third, the EPA's authority under the CWA, which includes establishing national effluent standards and approving and oversee-

ing state permit programs, would be compromised if it were barred from enforcing in states without EPA-approved programs. States would have no incentive to obtain approval or align their water quality standards with national effluent standards if they were allowed to invoke the § 1319(g) bar against the EPA. Such an anomalous result would undermine the national effectiveness of the CWA.

Fourth, both statutory bars in § 1319(g) require the state to enforce using comparable state law. Comparability has been interpreted as providing interested citizens a meaningful opportunity to participate in the enforcement process. New Union fails under this test of comparability because it did not provide the EPA or any other interested citizens with an opportunity to participate in the administrative process. Additionally, New Union is neither diligently prosecuting nor has it assessed a penalty that would preclude EPA enforcement.

Fifth, the plain language of § 1319(g)(6) does not affect the EPA's right to injunctive relief under §§ 1319(a) and (b). Specifically, § 1319(g)(6) limits the EPA's right to seek civil penalties, but makes no mention of injunctive relief, which is authorized by an entirely separate subsection. Therefore, the EPA may still seek injunctive relief even when barred from assessing civil penalties. Furthermore, allowing the EPA to seek injunctive relief in this case does not supplant New Union as the primary enforcer. Because New Union is not bringing Goldthumb into compliance with the ultimate goal of the CWA—halting pollution of the nation's waters—the EPA should be allowed to enforce the CWA. Whereas civil penalties would not achieve the CWA's purpose, an injunction would stop the polluting activity.

ARGUMENT

I. THE DEFINITION OF NAVIGABLE WATER UNDER THE CWA INCLUDES THE ARROYO D'ORO, EVEN WHEN DRY

The district court erred by determining that the definition of navigable water under the CWA does not include the Arroyo when dry. In its effort to avoid the determination of a constitutional question, the district court all but ignores another axiom of statutory construction—that a court must construe a statute to avoid absurd results. *See, e.g.*, *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523,

1529 (11th Cir. 1996). An unbiased analysis of the CWA results in the determination that the definition of navigable water under the CWA encompasses the Arroyo, even when dry.

A. The District Court's Construction of Navigable Water Under the CWA to Exclude Jurisdiction Over the Arroyo d'Oro When Dry Leads to an Absurd Result

When the district court dismissed both *United States v. Phelps Dodge Corp.*, 391 F. Supp 1181 (D. Ariz. 1975), and *Quivira Mining Co. v. U.S. Envtl. Prot. Agency*, 765 F.2d 126 (10th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986), as inapposite for failing to "address . . . whether intermittent streams are considered navigable water when they are dry or only when they are wet," R. at 7, it ignored the purpose of the CWA, which was enacted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[1] 33 U.S.C. § 1251(a).

Based on the purpose of the CWA, courts deciding cases such as *Phelps Dodge* and *Quivera Mining* have determined that the definition of navigable water under the CWA encompasses intermittent waterways exposed to continuous pollution sources, regardless of whether the waterway was wet or dry. *Quivera Mining*, 765 F.2d at 129 ("It is the intent of the [CWA] to cover, as much as possible, all waters of the United States instead of just some."); *Phelps Dodge*, 391 F. Supp at 1187 ("For the purposes of this Act to be effectively carried into realistic achievement, the scope of its control must extend to all pollutants which are discharged into any waterway, including normally dry arroyos, where any water which might flow therein could reasonably end up in any body or water . . . ."). However, the district court's conclusion that the definition of navigable water does not include an intermittent waterway that is exposed to non-continuous pollution only when dry causes an absurd segmentation of the CWA's definition of navigable water. The district court's construction of the CWA requires that Congress intended to distinguish between wa-

1. To achieve this objective, Congress set forth both (1) the national goal of ending water pollution by 1985, 33 U.S.C. § 1251(a)(1), and (2) "an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983." 33 U.S.C. § 1251(a)(2).

terways exposed to continuous pollution sources and those exposed to non-continuous pollution sources.[2]

Contrary to this proposition, when Congress drafted the CWA, it did not distinguish between continuous and non-continuous pollution sources. 33 U.S.C. §§ 1311(a) (generally prohibiting the discharge of *any* pollutant); 1311(e) (stating that "[e]ffluent limitations . . . shall be applied to *all* point sources of discharge of pollutants" (emphasis added)). Congress thus intended to address pollution by intermittent sources in the same manner as pollution by continuous sources.[3] Although the district court correctly stated the axiom of statutory construction that a court must construe a statute to avoid constitutional issues, R. at 8, it cannot avoid a constitutional challenge by construing the definition of navigable water in a manner that absurdly imposes a distinction between intermittent and continuous pollution sources. *Cf. Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) ("[T]he Court will construe [a] statute to avoid [serious constitutional] problems unless such construction is plainly contrary to the intent of Congress." (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988))).

B. An Unbiased Analysis of the Definition of Navigable Water Under the CWA Results in the Determination that it Extends to the Arroyo d'Oro

The determination of whether Congress included the Arroyo within the definition of navigable water begins with the statute itself. When enacting the CWA, Congress granted the EPA jurisdiction over navigable waters, defined as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Congress left the interpretation of the term "waters of the United

2. Such a construction would allow results such as those that occurred in the case before this Court, namely that a non-continuous polluter could escape the CWA by merely waiting until an intermittent waterway was dry before releasing its pollutants.

3. The district court suggests that such a construction is absurd, R. at 7-8 ("It boggles the imagination to say that bone-dry desert is water, let alone navigable."). Nevertheless, its decision that "EPA's inclusion of intermittent bodies of water within its definition of navigable waters means that they are navigable waters only when they are bodies of water, not when they are dry land," R. at 8, ignores the purpose of the CWA by causing an absurd segmentation between continuous and non-continuous pollution sources.

States" to agencies such as the EPA.[4] The EPA's definition of "waters of the United States" includes not only "[a]ll interstate waters," but also "[a]ll other waters . . . the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce," and also "[t]ributaries of [these] waters." 40 C.F.R. § 122.2 (emphasis added).

The application of 40 C.F.R. § 122.2 to the Arroyo results in the determination that navigable water includes the Arroyo. First, as the district court correctly noted, the Arroyo is an "interstate waterway," crossing New Union's border into the state of Progress. R. at 4-5, 7. The Arroyo thus falls directly within the definition. Second, after entering Progress, the Arroyo feeds into a permanent three-acre pool where the endangered Greenheaven pupfish ("Pupfish") subsists. Id. Any pollution entering the Arroyo thus enters the pool, which comprises a "key element" in Progress's Greenheaven Wildlife Preserve ("Preserve"). Id. The pollution that enters the pool affects the endangered Pupfish, thereby affecting interstate commerce. See 40 C.F.R. §§ 122.2(c), (d); infra Argument Section I.B.1.d.i. Third, the pollution interferes with the Preserve, further affecting interstate commerce. See 40 C.F.R. §§ 122.2(c), (d); infra Argument Section I.B.1.d.ii. Thus, the definition of navigable water under the CWA specifically includes the Arroyo.

Although an agency's interpretations of a statute traditionally receive great deference, see, e.g., Chevron v. Natural Res. Def. Council, 467 U.S. 837 (1984), the Supreme Court curtailed this deference for the application of CWA regulations to non-traditional navigable waters. SWANCC, 531 U.S. 159.[5] Nevertheless,

4. Although axiomatic that "[a]bsent a clearly expressed legislative intention to the contrary, [the language of the statute itself] must ordinarily be regarded as conclusive," *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980), and "an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress," *Bowen v. Georgetown Univ. Hosp.*, 448 U.S. 204, 208 (1988), when enacting the CWA, Congress intended that its definition of navigable waters, as amended, "be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Conf. Rep. No. 92-1236, at 144 (1972).

5. Nevertheless, *SWANCC*, by itself, is not determinative of whether the definition of navigable water under the CWA includes the Arroyo. In *SWANCC*, the Supreme Court held only that the regulation of "an abandoned sand and gravel pit" under the U.S. Army Corps of Engineers ("Corps") definition for waters of the United States, 33 C.F.R. § 328.3(a)(3), "as clarified and applied . . . pursuant to the 'Migratory Bird Rule,'[*see* 51 Fed. Reg. 41,217 (1986); 53 Fed. Reg. 20,765 (1988),] exceed[ed] the authority granted to the [Corps] under § 404(a) of the CWA," 531 U.S. at 174 (citations omitted). Although *SWANCC* applies with equal force to the EPA as to the

the inclusion of the Arroyo as navigable water survives analysis under the Commerce Clause.

1. Goldthumb's Pollution of the Arroyo d'Oro Significantly Affects Interstate Commerce

The Commerce Clause empowers Congress to "regulate Commerce . . . among the several states." U.S. Const. art. I, § 8, cl. 3. In *United States v. Lopez, 514 U.S. 549 (1995), the Supreme Court established that Congress may regulate "'three broad categories of activity'" under its Commerce Clause power: (1) "'the use of channels of interstate commerce'"; (2) "'the instrumentalities of interstate commerce'"; and (3) "'activities that substantially affect interstate commerce.'"* United States v. Morrison, 529 U.S. 598, 608-09 (2000) (alteration in original) (quoting Lopez, 514 U.S. at 558-59).

Although neither the first nor the second categories apply to Goldthumb's pollution of the Arroyo, under the third *Lopez* category, Congress may regulate interstate activities that do not individually have a pronounced effect on interstate commerce, if the aggregate effect of the class of activities is substantial. *See, e.g.*, *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (reasoning that although the impact of an individual farmer's activity on the interstate wheat market was minimal, if all farmers engaged in the same activity, the impact could be significant). In *United States v. Morrison*, the Supreme Court enumerated four factors that aid in the determination of whether an activity falls within this third category. 528 U.S. at 609-12. These factors are:

Corps—the EPA cannot rely on the Migratory Bird Rule to determine its jurisdiction under the CWA, *United States v. Krilich*, 152 F. Supp. 2d, 983, 988 (N.D. Ill. 2001); *see also San Francisco Baykeeper v. Cargill Salt Div.*, 263 F.3d 963, 964 (9th Cir. 2001); *Rice v. Harken Expl. Co.*, 250 F.3d 264, 268-69 (2d Cir. 2001), the EPA does not rely on the Migratory Bird Rule to assert jurisdiction over the Arroyo.

Furthermore, the case before this Court is factually distinguishable from *SWANCC*. First, unlike the migratory birds in *SWANCC*, the Greenheaven pupfish is an endangered species that continuously occupies the pool fed by the Arroyo. *See* R. at 5. Second, the habitat in *SWANCC* was artificial—it existed because "the water areas and spoil piles [of an abandoned gravel mining operation] had developed a natural character," 531 U.S. at 165, whereas the Arroyo and the Greenheaven pupfish habitat are entirely natural. *See* R. at 5. Third, SWANCC involved "nonnavigable, isolated, *intrastate* waters," 531 U.S. at 169 (emphasis added), whereas the Arroyo, although nonnavigable, is neither isolated nor intrastate—it feeds into a permanent three-acre pool located outside the borders of New Union. R. at 4-5. Thus, SWANCC does not control whether the definition of navigable water under the CWA includes the Arroyo.

> (1) whether the statute regulates "commerce," or an activity that might be deemed an "economic activity," broadly defined;
> (2) whether the statute has an "express jurisdictional element" that restricts its application to activities that have "an explicit connection with or effect on interstate commerce";
> (3) whether congressional findings support the judgment that the activity in question has a substantial effect on interstate commerce; and
> (4) whether the [activity] has an attenuated relationship to that substantial effect on interstate commerce.

United States v. Kallestad, 236 F.3d 225, 228 (5th Cir. 2000) (quoting *Morrison*, 529 U.S. at 609-612), *quoted in GDF Realty Invs., Ltd. v. Norton*, 169 F. Supp. 2d 648, 657 (S.D. Tex. 2001). The analysis of the Arroyo under these factors results in the determination that it comes within Congress's Commerce Clause jurisdiction.

a. Goldthumb's pollution of the Arroyo d'Oro is an economic activity

Under the first *Morrison* factor, a court determines whether "the activity in question [is] some sort of economic endeavor." 529 U.S. at 610. When making this determination, courts have unanimously found that the economic nature of an activity must be defined broadly. *See, e.g.*, *Kallestad*, 236 F.3d at 228; *Gibbs v. Babbitt*, 214 F.3d 483, 491 (4th Cir. 2000) (explaining *Wickard*, 317 U.S. 111), *cert. denied*, *sub nom. Gibbs v. Norton*, 531 U.S. 1145 (2001); *Groome Res. Ltd. v. Parish of Jefferson*, 234 F.3d 192, 208 (5th Cir. 2000); *United States v. Gregg*, 226 F.3d 253, 263 (3d Cir. 2000).

In this case, Goldthumb's discharges constitute economic activity. First, mining is unquestionably an economic activity with interstate ramifications, especially here, where the mineral sought is gold. Second, Goldthumb benefits economically from its release of pollutants. By discharging its cyanide baths, Goldthumb saves itself the expense of building a bigger or better containment system.[6] Goldthumb thus acts with a business pur-

6. According to the district court, "[t]he Goldthumb operation employs the most modern mining methods, is very efficient at recovering gold from the ore, and evidently takes care to prevent environmental contamination." R. at 4. Nevertheless, it seems quite paradoxical that Goldthumb has undoubtedly expended vast amounts of money for its modern mining systems, and yet refused further expenditure to prevent the discharge of "small amounts of its evaporation pond water." *Id.*

pose. See 33 U.S.C. § 1319(d) (directing courts to consider the economic benefits arising from a violation when determining civil penalties); S. Rep. No. 99-50, at 25 (1985) ("Violators should not be able to obtain an economic benefit vis-à-vis their competitors due to their noncompliance with environmental laws."). Even though money saved by Goldthumb may have only an infinitesimal effect on the national economy, the aggregate effects of all similar mining operations is substantial. See *Wickard*, 317 U.S. at 125.

Furthermore, because Goldthumb's activities, including its pollution, are economic in nature and *interstate*, they are distinguishable from the non-economic activities held unregulatable in *Lopez* and *Morrison*. See *Lopez*, 514 U.S. at 567 (gun possession in a school zone); Morrison, 529 U.S. at 613 (gender-motivated crimes). By contrast, the Supreme Court has "upheld a wide variety of congressional Acts" that regulated economic activity, even when the activity occurs entirely *intrastate*. *Morrison*, 529 U.S. at 610 (emphasis added); *see also* *Lopez*, 514 U.S. at 560 (explaining that the regulation of homegrown wheat in *Wickard*, 317 U.S. 111, "involved economic activity in a way that the possession of a gun in a school zone does not.").

b. The lack of an express jurisdictional element is by no means dispositive

The second *Morrison* factor examines whether the statutory language at issue "has an 'express jurisdictional element' that restricts its application to activities that have 'an explicit connection with or effect on interstate commerce.'" *Kallestad*, 236 F.3d at 228 (quoting *Morrison*, 529 U.S. at 609-612). Although no express jurisdictional element appears to exist here, *see* 33 U.S.C. § 1362(7), the lack of a jurisdictional element is by no means dispositive, and furthermore, is relevant *only* in those cases in which a *non-economic activity* is being regulated. *Groome*, 234 F.3d at 211. Moreover, in *United States v. Wilson*, 133 F.3d 251, 256-57 (4th Cir. 1997), the Fourth Circuit refused to extend the coverage of the CWA to regulate activity even though the activity *could* affect interstate commerce, thus reading a jurisdictional element into the statute. *See also* *Cargill Inc. v. United States*, 516 U.S. 955, 958 (1995) (J. Thomas, dissenting). *But see* *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 261 (7th Cir. 1993).

c. Congress has determined that water pollution substantially affects interstate commerce

The third *Morrison* factor examines legislative history to determine whether it provides insight into "the legislative judgment that the activity in question substantially affects interstate commerce." 529 U.S. at 612. Even though Congress "is *not* required to make formal findings as to the substantial burdens that an activity has on interstate commerce," *id.* (emphasis added), courts have recognized for years that "[t]he legislative history of the [CWA] is laden with reports, references and statements supporting the widely accepted conclusion that water pollution is a national problem severely affecting the health of our people, the welfare of the nation and the efficient conduct of interstate commerce." *United States v. Ashland Oil & Transp. Co.*, 364 F. Supp. 349, 351 (W.D. Ky. 1973) (citation omitted)), *aff'd*, 504 F. 2d 1317 (6th Cir. 1974); *see also United States v. Holland*, 373 F. Supp. 665, 673 (M.D. Fla. 1974) (holding that "[i]t is beyond question that water pollution has a serious effect on interstate commerce").

d. A clear link exists between the pollution of the Arroyo d'Oro and interstate commerce

The fourth *Morrison* factor consists of an attenuation analysis. *See* 529 U.S. at 612, 615 (refusing to follow a "but-for causal chain . . . to every attenuated effect"); *see also Lopez*, U.S. at 567 (refusing to "pile inference upon inference" in order to find a nexus with interstate commerce). Nevertheless, the substantial relation analysis considers the class of regulated activities, not merely individual instances. *Perez v. United States*, 402 U.S. 146, 154 (1971). *See Lopez*, 514 U.S. at 558 ("'[W]here a general regulatory statute bears a substantial relationship to commerce, the *de minimus* character of individual instances arising under that statute is of no consequence.'" (emphasis omitted) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968)). Thus, in the case before this Court, the EPA must prove only that Goldthumb's activities, "*in the aggregate*," substantially affect interstate commerce. *Id.* at 561 (emphasis added).

First, the pollution of the Arroyo directly affects interstate commerce because Goldthumb benefits from its discharges: in the aggregate, pollution by all similarly situated mining operations significantly affects interstate commerce. *See supra* Argument Section I.B.1a. Second, Goldthumb's discharges affect the

Pupfish. Water that runs through the Arroyo during rainy periods feeds into a three-acre pool, Greenheaven, that contains an endangered species, the Pupfish. R. at 4-5. This water carries with it the chemical residue left by Goldthumb's discharges. *Cf. id.* These discharges contain not only cyanide, but also heavy metals, R. at 4, all of which are toxins that jeopardize the survival of the Pupfish, thereby affecting interstate commerce. Third, Goldthumb's discharges similarly affect the Preserve.

i. The presence of the Greenheaven pupfish, an endangered species, satisfies the requisite nexus with interstate commerce

Goldthumb's discharges into the Arroyo affect interstate commerce, because of their direct effect on the Pupfish. The discharges contain both cyanide and heavy metals. *Id.* "Fish are [among] the most cyanide-sensitive group[s] of aquatic organisms." Ronald Eisler et al., *Sodium Cyanide Hazards to Fish and Other Wildlife from Gold Mining Operations*, *in* Environmental Impacts of Mining Activities: Emphasis on Mitigation and Remedial Measures 55, 58 (M. Azcue Jos ed., 1999). Extremely low levels of exposure provoke physiological and pathological responses that interfere with reproductive capacity and swimming ability. *Id.* at 59. Furthermore, heavy metals also cause deleterious effects in fish, such as "reduced growth, impaired reproduction, and mortality." U.S. Fish & Wildlife Service, Department of the Interior, An Assessment of Sediment Injury in the Grand Calumet River, Indiana Harbor Canal, Indiana Harbor, and the Nearshore Areas of Lake Michigan 14 (2000). For the Pupfish, exposure to heavy metals will occur either as the contaminated runoff enters the Greenheaven pool, or as a result of bioaccumulation.[7] *See* David Doneski, Article & Comment, *Cleaning Up Boston Harbor: Fact or Fiction?*, 12 B.C. Envtl. Aff. L. Rev. 559, 580 (1985) (citing Office of Marine Discharge Evaluation, Environmental Protection Agency, Analysis of the Section 301(h) Secondary Treatment Waiver Application for Boston Metropolitan Dist. Comm'n 11 (June 30, 1983)). Thus, Goldthumb's discharges affect the survival of the endangered Pupfish.

When making its decision, the district court did not consider the nexus between endangered species and interstate commerce.

7. "Bioaccumulation is the successive magnification of the concentration of a material present in the tissues of organisms at successive levels of the food chain." Robert L. O'Halloran, Comment, *Ocean Dumping: Progress Toward a Rational Policy of Dredged Waste Disposal*, 12 Envtl. L. 745, 750 n.31 (1982).

See R. at 8 (calling the Pupfish an "unremarkable species").[8] However, the presence of the endangered Pupfish satisfies the requisite nexus with interstate commerce. As the Court of Appeals for the D.C. Circuit stated:

> To allow even a single species whose value is not currently apparent to become extinct therefore deprives the economy of the option value[9] of that species. Because our current knowledge of each species and its possible uses is limited, it is impossible to calculate the exact impact that the loss of the option value of a single species might have on interstate commerce. In the aggregate, however, we can be certain that the extinction of species and the attendant decline in biodiversity will have a real and predictable effect on interstate commerce.

Home Builders, 130 F.3d at 1053 (emphasis added) (footnote and citation omitted); *see also id. at 1052 n.12 (discussing specific examples of the value of endangered species, such as how the venom from the endangered Malayan pit viper prompted the development of a hypertension drug that brings the Squibb Company over $1.3 billion annually in sales). Furthermore, "[s]ome of the most important medical products derive from organisms that were once considered worthless or nearly so." Id. at 1053 n.13 (discussing the importance of the Penicillin mold). Thus "'the de minimis character of individual instances [involving an endangered species] is of no consequence,'" id. at 1054 (quoting Lopez, 514 U.S. at 558): the aggregate effect on endangered species caused by Goldthumb and any similarly situated polluter significantly affects interstate commerce.*

ii. The effect of Goldthumb's pollution on the Preserve also satisfies the requisite nexus with interstate commerce

Goldthumb's discharges also affect the Preserve. The pollutants released into the Arroyo, which include cyanide and heavy metals, interfere with plant growth. J.R. Peralta et al., *Study of the Effects of Heavy Metals on Seed Germination and Plant Growth on Alfalfa Plant (Medicago sativa) Grown in Solid Media,*

8. When considering a motion for summary judgment, a court must construe all facts and inferences in a light most favorable to the non-moving party. *Butler*, 172 F.3d at 745. The district court erred by characterizing the Greenheaven pupfish in a manner that is clearly favorable to Goldthumb.

9. "'[O]ption value' [is] the value of the possibility that a future discovery will make useful a species that is currently thought of as useless." *National Assoc. of Home Builders v. Babbitt*, 130 F.3d 1041, 1053 (D.C. Cir. 1997).

in Proceedings of the 2000 Conference on Hazardous Waste Research 135 (2000) (stating the effects of heavy metals on plants, such as metabolic disorders and growth inhibition). The effect on plant life affects not only the wildlife in the Preserve, but also detracts from the aesthetic beauty of the Preserve, making it less attractive to visitors. Likewise, the effect of Goldthumb's discharges on the Pupfish, *see supra* Argument Section I.B.1.d.i., also makes the park less attractive.

As with the Pupfish, the district court did not consider the nexus between wildlife preserves and interstate commerce. *See* R. at 8 (describing the Preserve as an intrastate concern).[10] Regardless of the extent to which the Preserve actually affects interstate commerce, in the aggregate, wildlife preserves comprise "part of a $29.2 billion national wildlife-related recreational industry that involves tourism and interstate travel." *Gibbs*, 214 F.3d at 493. Thus, in the aggregate, discharges by Goldthumb and similarly situated polluters significantly affect interstate commerce.

2. Regulation of Mining Pollution Under the CWA does not Constitute a Land Use Regulation

Regulation under the CWA does not intrude upon the traditional authority of state and local governments to govern land use. "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 587 (1987); *see also Va. Surface Mining*, 452 U.S. at 275-76. The CWA acts as a form of environmental protection or pollution control, *see* 33 U.S.C. § 1251, leaving the ultimate determination of land use to state and local authorities. In other words, the CWA does not dictate the particular use to which property may be employed; rather, it regulates the manner in which the proposed use can be accomplished by eliminating or mitigating its environmental impacts. Furthermore, "the power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have an effect in more than one State." *Va. Sur-*

10. When considering a motion for summary judgment, a court must construe all facts and inferences in a light most favorable to the non-moving party. *Butler*, 172 F.3d at 745. The district court erred by characterizing the Greenheaven Wildlife Preserve in a manner that is clearly favorable to Goldthumb.

face Mining, 452 U.S. at 282. Thus, the regulation of pollution under the CWA does not implicate the Tenth Amendment issues raised in both *Lopez* and *Morrison*. *See Lopez*, 514 U.S. at 566; *Morrison*, 529 U.S. at 615, 616-618.

C. This Court Must Reverse the District Court's Decision that the Definition of Navigable Water Under the CWA does Not Include the Arroyo d'Oro

The district court erroneously determined that the definition of navigable water under the CWA does not include the Arroyo. The district court's decision leads to an absurd result because it requires an illogical bifurcation of the CWA's definition of navigable water. *See supra* Argument Section I.A.

Furthermore, including the Arroyo under the CWA's definition of navigable water does not exceed the limits of the Commerce Clause—Goldthumb's pollution of the Arroyo substantially affects interstate commerce, as determined by the *Morrison* four-factor test. First, Goldthumb's pollution of the Arroyo is an economic activity, distinguishable from the activities in *Lopez* and *Morrison*. *See supra* Argument Section I.B.1.a. Second, even though the statutory language contains no express jurisdictional element, this factor is not dispositive. *See supra* Argument Section I.B.1.b. Third, the legislative history of the CWA expresses Congress's belief that water pollution substantially affects interstate commerce. *See supra* Argument Section I.B.1.c. Fourth, a clear link exists between Goldthumb's pollution of the Arroyo and interstate commerce because the pollution affects both the endangered Pupfish and the Preserve. *See supra* Argument Section I.B.1.d.

Finally, the regulation of mining pollution under the CWA does not implicate the Tenth Amendment concerns raised in *Lopez* and *Morrison*. *See supra* Argument Section I.B.2. Thus, this Court must reverse the district court's decision that excludes the Arroyo from the CWA's definition of navigable water, because it defies Congress's intent when enacting the CWA.

II. CONGRESS'S JURISDICTION UNDER THE COMMERCE CLAUSE EXTENDS TO INTERMITTENT INTERSTATE STREAMS THAT DO NOT MEET ANY TRADITIONAL TEST OF NAVIGABILITY AND ARE NOT TRIBUTARY TO WATERS THAT MEET ANY SUCH TEST

The Constitution grants Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. This power, "like all others vested in [C]ongress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the [C]onstitution." *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824). Furthermore, the Commerce Power is not confined to the regulation of commerce among the states: "It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end." *United States v. Darby*, 312 U.S. 100, 118 (1941). Supplementing its power to regulate commerce, Congress may enact laws that it deems "necessary and proper" to achieve that end. *Groome*, 234 F.3d at 202 (quoting U.S. Const. art. I, § 8, cl. 18).

Congress enacted the CWA to "to restore and maintain the . . . integrity of the Nation's waters." 33 U.S.C. § 1251(a). "The 'major purpose' [for the Act] was 'to establish a *comprehensive* long-range policy for the elimination of water pollution.'" *SWANCC*, 531 U.S. at 179 (J. Stevens, dissenting) (quoting S. Rep. No. 92-414, at 95 (1972)). Congress intended that the reach of the CWA extend to the limits of its power under the Commerce Clause. *United States v. Riverside Bayview Homes*, 474 U.S. 121, 133 (1985) (citing S. Conf. Rep. No. 92-1236, at 144-1236118 Cong. Rec. 33,756 (1972) *Leslie Salt Co. v. United States*, 896 F.2D 354 (9TH CIR. 1990) (CITING *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-08 (1940)), the Supreme Court explicitly recognized that "Congress is not limited by the 'navigable waters' test in its authority to control pollution under the Commerce Clause." *Holland*, 373 F. Supp. at 673; *accord*, *Riverside Bayview Homes*, 474 U.S. at 133 (recognizing that Congress intended the scope of navigable water to extend beyond its classical definition). Thus, the traditional test of navigability is no longer the touchstone that determines navigable water under the CWA.

Moreover, the Supreme Court's decision in *SWANCC* is narrow: it does not control the question presented by this Court.

First, the SWANCC Court did not determine the exact meaning of navigable waters under the CWA. *United States v. Interstate Gen. Co.*, 152 F. Supp. 2d 843 (D. Md. 2001). Second, the SWANCC Court did not strike down any part of the CWA, *see* 531 U.S. at 174, nor any part of the implementing regulations that the Migratory Bird Rule was intended to clarify. *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 119 (E.D.N.Y. 2001) (noting the continuing validity of 40 C.F.R. § 122.2); *accord Rancho Viejo v. Norton*, No. CIV.A.1:00CV02798, 2001 WL 1223502, at *9 (D.D.C. 2001). Third, SWANCC did not overrule any existing case law that broadly interprets the reach of the CWA, such as *Riverside Bayview Homes*, 474 U.S. 121, *see* SWANCC at 170-72 (distinguishing *Riverside Bayview Homes*, but leaving it intact), and *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (upholding the EPA's broad definition of navigable waters as including almost any body of surface water that might affect interstate commerce). Thus, SWANCC only addressed the Migratory Bird Rule as a basis for determining whether *isolated* wetlands fall under the definition of waters of the United States. *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001) (determining that SWANCC was limited to the specific application of the Migratory Bird Rule to isolated waters); *accord United States v. Krilich*, 152 F. Supp. 2d 983, 988 (N.D. Ill. 2001), *aff'd*, 303 F.3d 784 (7th Cir. 2002); *Rancho Viejo*, 2001 WL 1223502, at *9.

Accordingly, Congress's power to regulate intermittent interstate streams, even when dry, is limited only by the reach of the Commerce Clause, and not by any test of navigability. *Cf.* SWANCC, 531 U.S. at 173 (noting the necessity for Commerce Clause analysis).

III. ENFORCEMENT BY A STATE WITHOUT AN EPA-APPROVED PERMIT PROGRAM CANNOT PREVENT EPA ENFORCEMENT UNDER CWA SECTION 309(g)

The district court erred in holding that enforcement by a state without an EPA-approved permit program under the CWA can prevent EPA enforcement under 33 U.S.C. § 1319(g). States with non-approved National Pollution Discharge Elimination System (NPDES) permit programs cannot raise the § 1319(g) bar against EPA actions. First, New Union's enforcement actions do not have the same force and effect as actions by states with approved programs because New Union's program has not undergone the scru-

tiny required by the EPA's approval process. Second, even though a non-approved state may be diligently prosecuting under its own laws, prohibiting the EPA from bringing an action against a violator in such a state severely limits the EPA's authority to establish national effluent standards and oversee state permit programs, thereby undermining the national effectiveness of the CWA.

A. Non-Approved State Permit Programs do Not Have the Same Force and Effect of EPA-Approved Programs Because They Did Not Undergo the Scrutiny of the Approval Process

33 U.S.C. § 1342 establishes an exception to the general prohibition against discharge of pollutants into the Nation's waters with the creation of the NPDES permit program. 33 U.S.C. § 1342. As part of a policy of cooperative federalism and in lieu of the federal NPDES program, "[t]he CWA authorizes a state to develop and administer its own [NPDES] permit program, as long as the program meets federal requirements and gains approval from EPA's administrator." 33 U.S.C. § 1342(b).

The CWA authorizes the EPA to promulgate minimum regulations for state programs. 33 U.S.C. § 1314(i). The permit process is arduous, requiring states to submit complete program descriptions, 40 C.F.R. § 123.22, and a memorandum of agreement. 40 C.F.R. § 123.24. Following submission of the complete state program, the EPA publishes notice of the state's application and conducts a comment period and a public hearing. 40 C.F.R. § 123.61(a). Provided that the state program meets the requirements of the federal regulations, the EPA Administrator, taking into consideration the comments received, approves or disapproves of the State program.[11] 40 C.F.R. § 123.61(b). If disapproved, the EPA provides the state with both reasons for the disapproval and proposed modifications to the program. 40 C.F.R. § 123.61(d).

States seeking approval must also specify the extent to which the EPA waives its right to review, object to, or comment on state-issued permits. 40 C.F.R. § 123.24(d). The EPA, however, cannot waive its right to review certain classes of discharges, namely where one state's discharges may affect the waters of another

11. Approval by the EPA is mandatory except where the Administrator determines that adequate state authority does not exist to issue permits that insure compliance with any applicable requirements, i.e. effluent limits, water quality standards, and toxic effluent standards. 33 U.S.C. § 1342(b)(1).

state. 40 C.F.R. § 123.24(d)(2). This regulation is significant in this case, where Goldthumb's discharge originates in New Union and travels into Progress. Even if New Union had submitted its program and obtained EPA approval, the EPA cannot waive its right to intervene and review permits issued by New Union where discharges in New Union affect another state.

Although Congress did not modify the general definition of "state" in § 1319(g), allowing non-approved states to apply the § 1319(g) bar would be absurd. Non-approved programs have not endured the lengthy approval process described above; as a result, there is no assurance that these states are enforcing in the manner prescribed by the CWA. Therefore, contrary to the district court's holding, the enforcement actions of non-approved states do not have the same force and effect as the actions of approved states. If New Union can avail itself of the § 1319(g) bar and block EPA enforcement without obtaining approval of its permit program, there would be no incentive for any other state to obtain EPA approval and thereby comply with national effluent standards. The CWA's state approval and permit review process would be meaningless.

B. Holding Non-Approved States to a Lesser Standard Severely Limits the EPA's Authority to Oversee State Permits and Its Ability to Establish National Effluent Standards, Thereby Undermining the National Effectiveness of the CWA

The objective of the CWA is "to restore and maintain the . . . integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this objective, the CWA declares two national policies that (1) prohibit the discharge of toxic pollutants, 33 U.S.C. § 1251(a)(3), and (2) implement areawide waste treatment management processes to assure adequate control of sources of pollutants. 33 U.S.C. § 1251(a)(5). As part of this national regulation of pollutants, the CWA contemplates national standards of effluent limitations. *Am. Frozen Food Inst. v. Train*, 539 F.2d 107 (D.C. Cir. 1976) (holding that the CWA contemplates national standards rather than standards for individual plants).

Accordingly, even where a state has an EPA-approved program, the statutory scheme of the CWA provides the EPA with continuing dominion over state NPDES programs. *W. Va. Coal Assoc. v. Reilly*, 728 F. Supp. 1276, (D. W. Va. 1989). The EPA has broad authority to oversee state permit programs. *Arkansas v.*

Oklahoma, 503 U.S. 91, 105 (1992). States must provide the EPA with copies of all NPDES permit applications. 33 U.S.C. § 1342(d)(1). Next, the EPA can object to state issued permits. 33 U.S.C § 1342(d)(2). If a state fails to submit a revised permit that satisfies the EPA's objections, the EPA may then issue its own permit containing its own conditions. 33 U.S.C. § 1342(d)(4). Ultimately, the EPA holds complete dominion over state programs because the EPA must withdraw approval of the state NPDES program when the state does not administer its program in accordance with the CWA. 33 U.S.C. § 1342(c)(3).

By precluding the EPA from enforcing against Goldthumb because of New Union's "enforcement" under its own non-approved permit program, the district court severely limits the EPA's authority to establish national effluent standards and oversee state permits. States have no incentive to align their own discharge and water quality standards to those of the NPDES program, thereby undermining any coherent set of national effluent standards. Ultimately, the district court's holding eviscerates the national protection scheme contemplated by the CWA.

IV. NEW UNION'S ACTIONS DO NOT PREVENT EPA ENFORCEMENT UNDER SECTION 309 OF THE CWA BECAUSE THE ACTIONS WERE NOT BROUGHT UNDER STATE LAW SUFFICIENTLY COMPARABLE TO FEDERAL LAW NOR WERE THE ACTIONS DILIGENTLY PROSECUTED

The district court erred in holding that a state need not enforce using authority comparable to § 1319(g) in order to prevent EPA enforcement. The EPA is precluded from enforcement under § 1319(g) in two instances. First, EPA enforcement is precluded where "a State has commenced and is diligently prosecuting an action under a State law comparable to this section." 33 U.S.C. § 1319(g)(6)(A)(ii). Second, EPA enforcement is precluded where "the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this section, or such comparable State law." 33 U.S.C. § 1319(g)(6)(A)(iii).

These limitations ensure that federal actions do not duplicate state actions and penalties imposed on violators of the CWA. *Wash. Pub. Interest Research Group v. Pendleton Woolen Mills*, 11 F.3d 883, 885 (9th Cir. 1993). *See also N. & S. Rivers Watershed*

Assoc., Inc. v. Town of Scituate, 949 F.2d 552, 556 (1st Cir. 1991) (stating that "[t]he focus of the statutory bar to citizen's suits is . . . on whether corrective action already taken and diligently pursued by the government seeks to remedy the same violations as duplicative civilian action").

Both these limitations, however, require that state actions are brought under laws comparable to § 1319. 33 U.S.C. §§ 1319(g)(6)(A)(ii), (iii). In this case, New Union's actions do not meet the requirements of comparability because the EPA did not have a meaningful opportunity to participate at significant stages of the decision-making process. *Jones v. City of Lakeland*, 224 F.3d 518, 524 (6th Cir. 2000). Furthermore, because New Union is not diligently prosecuting an action against Goldthumb, the United States is not barred from bringing its enforcement action. Finally, because New Union has not assessed a penalty against Goldthumb, the second bar also does not prevent the United States from acting. Thus, neither statutory bar precludes the United States from acting against Goldthumb and this Court should invalidate the district court's holding.

A. New Union Must be Currently Prosecuting or Must Have Assessed a Penalty Under Comparable Laws to Section 309(g) of the CWA Before the EPA is Precluded from Enforcement

The Ninth Circuit has adopted a narrow view of the comparability requirement for application of the statutory bars to citizen suits. *See Bishop v. City of Montgomery*, No. 00-A-527-N, 2001 U.S. Dist. LEXIS 522, at *10 (D. Ala. Jan. 16, 2001). According to this view, a plain reading of the statutory language of 33 U.S.C. § 1319(g)(6)(A)(ii) requires that the State be currently prosecuting an action. *Citizens for a Better Envt. v. Union Oil Co.*, 83 F.3d 1111, 1118 (9th Cir. 1996) (concluding that the "diligently prosecuting" bar was not applicable to citizen suit where state enforcement action was no longer being prosecuted following settlement with an alleged polluter), *cert. denied*, 519 U.S. 1101 (1997). *See also Knee Deep Cattle, Inc. v. Bindana Inv. Co.*, 94 F.3d 514, 516 (9th Cir. 1996) (concluding that the state was not prosecuting an action at the time plaintiff filed its citizen suit because the Order was entered into before plaintiff filed suit), *cert. dismissed*, 519 U.S. 1144 (1997).

Similarly, the plain language of § 1319(g)(6)(A)(iii) requires that a penalty be assessed against the violator under a state law

comparable to the CWA. *Union Oil*, 83 F.3d at 1118; *see also Molokai Chamber of Commerce v. Kukui*, 891 F. Supp. 1389, 1405 (D. Haw. 1995) (holding that a state "must seek penalties and not merely compliance in order for its action to have a preclusive effect"); *Pub. Interest Research Group v. N.J. Expressway Auth.*, 822 F. Supp. 174, 184 (D.N.J. 1992) (holding § 1319(g) inapplicable because no penalties had been assessed).

New Union's actions do not satisfy the comparability requirement of either statutory bar. The plain meaning of the statutory language is that *unless* a state is "diligently prosecuting" and the violator has "paid a penalty assessed," 33 U.S.C. 1319(g)(6)(A) does *not* apply to bar the EPA's action. *See* 33 U.S.C. §§ 1319(g)(6)(A)(ii), (iii). New Union is not currently prosecuting Goldthumb: the discharges in both July 2000 and July 2002 were permitted by NUDEP. R. at 5. Furthermore, no penalty was assessed or even sought: the NUDEP inspector merely observed the drainage of the wastewater into the Arroyo. *Id.* Thus, because New Union (1) is not currently prosecuting Goldthumb, (2) only sought compliance in its enforcement action, and (3) did not assess penalties, § 1319(g) cannot bar action by the EPA.

B. New Union's Actions are Not Sufficiently Comparable to Actions Brought Under Section 309(g) of the CWA Because EPA was Not Provided a Meaningful Opportunity to Comment on or Review New Union's Administrative Actions

In contrast to the Ninth Circuit's interpretation of comparability, the Eighth Circuit has adopted a broader view that departs from the plain statutory wording of § 1319(g). *Molokai Chamber of Commerce*, 891 F. Supp. at 1404. According to the Eighth Circuit, comparability may be satisfied if "the state law contains comparable penalty provisions which the state is authorized to enforce, has the same overall enforcement goals as the federal CWA, provides interested citizens a meaningful opportunity to participate at significant stages of the decision-making process, and adequately safeguards their legitimate substantive interests." *Ark. Wildlife Fed. v. ICI Ams., Inc., 29 F.3d 376, 381 (8th Cir. 1994), cert. denied*, 513 U.S. 1147 (1995). Even where states have similar statutory provisions, statutes have been found incomparable where "specific facts of the case 'demonstrate that the state denied an interested party a meaningful opportunity to participate in the state administrative enforcement process.'" *L.E.A.D.*

(Local Envtl. Awareness Dev.) Group of Berks v. Exide Corp., No. 96-3030, 1999 WL 124473, at *31 (E.D. Pa. Feb. 19, 1999) (citing *ICI*, 29 F.3d at 382).

New Union's actions fail to satisfy this broad interpretation of comparability. New Union did not afford the EPA any meaningful opportunity to participate in the enforcement process. By sending an inspector to determine whether conditions were suitable for discharge and then granting permission during these same inspections, New Union failed to provide public notice of Goldthumb's requests to discharge wastewater into the Arroyo. R. at 5. Furthermore, New Union provided no opportunities for review or public commentary to either the EPA or other interested citizens, including the State of Progress. *Id.*

Finally, New Union's actions were not comparable because they did not adequately safeguard the EPA's legitimate substantive interests in maintaining the integrity of the nation's waters. *See* 33 U.S.C. § 1251(a). If upheld, New Union's actions create a gross injustice by precluding the EPA from taking an action pursuant to the national objectives of the CWA. *Id.* Affirmation of the district court's holding that New Union acted under state law comparable to the CWA not only validates New Union's "use of unilateral discretionary authority," but also freezes out other similarly situated citizens from commencing an action or intervening in an ongoing state action. *Jones*, 224 F.3d 518 at 524 (citation omitted).

In short, because New Union's actions did not provide a meaningful opportunity for the EPA to comment or participate in the state administrative process, Goldthumb's argument that New Union has already enforced against them, R. at 1, does not satisfy the comparability requirement of the statutory bars.

C. New Union is Not Diligently Prosecuting Goldthumb

In addition to comparability, for New Union's action to bar a suit under § 1319(g)(6)(A)(ii), New Union must be diligently prosecuting Goldthumb. 33 U.S.C. § 1319(g)(6)(A)(ii). The overriding concern of this requirement is to "assure vigorous enforcement of the CWA to achieve [its] stated goals." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 890 F. Supp. 470, 489 (D.S.C. 1995).

Although an agency's diligence is presumed, *Williams Pipeline Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1324 (1997) (citing *Laidlaw*, 890 F. Supp. at 487), prosecution by the state is not *ipso*

facto "diligent." *Citizens Legal Envtl. Action Network, Inc. v. Premium Standard Farms, Inc.*, No. 97-6073-CV-SJ-6, 2000 WL 220464, at * 12 (W.D. Mo. Feb. 23, 2000). Congress intended that courts inquire into the adequacy of an agency's action. S. Rep. No. 92-414, at 180-414*Conn. Fund for the Env't v. Contract Plating Co.*, 631 F. Supp. 1291 (D. Conn. 1986).

When analyzing diligence, courts examine the totality of the circumstances and look at allegations of non-diligence "against the background of agency action." *Laidlaw*, 890 F. Supp.at 489-90 . Courts elsewhere have analyzed various indicia of diligence to determine whether a state has acted in dilatory or collusive ways. *CLEAN*
*, 2000 WL 220464, at *13. These indicia include (1) "whether the government required compliance with the specific standard invoked . . .by the suit," (2) "whether the government was monitoring the polluter's activities," (3) "the possibility that the . . . alleged violations will continue," and (4) "the severity of any penalties compared to . . . the polluter's economic benefits in not complying with the law." Id.* Under each of these indicia of diligence, New Union is not diligently prosecuting Goldthumb.

1. New Union's Failure to Issue an NPDES Permit Under its Own Laws and its Permission to Allow Goldthumb to Continue to Discharge Pollutants into the Arroyo does not Constitute Diligent Prosecution

Whether a state requires compliance with a specific standard or limitation invoked under the suit is one indicia of diligence. *Id.* New Union law prohibits the "addition of any pollutant from any sources to the waters of the State" without a state issued permit, 50 N.U.R.S. § 28(a), and also authorizes NUDEP to enforce against violators through injunctive relief, civil penalties and administratively assessed penalties. R. at 6. However, NUDEP did not prosecute Goldthumb under any of these authorities and did not comply with its own laws. R. at 10. Instead of a formal permit, New Union issued two administrative compliance orders warning Goldthumb that it lacks permission to discharge materials into the Arroyo. R. at 5, 10. Even more egregiously, NUDEP inspectors gave oral permission and supervised the discharge of contaminated liquid into the Arroyo all on the same day, without public notice or review. R. at 5. Finally, New Union has established a pattern of action over the past two years and projected similar enforcement actions for the following year. *Id.* Accord-

ingly, the record persuasively shows that New Union has exercised its enforcement powers in a dilatory, collusive, and bad faith manner that enables Goldthumb to continue to discharge pollutants into the Arroyo.

2. New Union's Minimal Efforts at Monitoring Goldthumb's Activities do Not Constitute Diligent Prosecution

Diligent prosecution is not limited to ordering compliance with the CWA by a certain date or according to a timetable. *Bayer*, 964 F. Supp. at 1324 (citing *Conn. Coastal Fishermen's Assoc. v. Remington Arms Co.*, 777 F. Supp. 173, 185 (D. Conn. 1991), *aff'd in part, rev'd in part*, 989 F.2d 1305 (2d Cir. 1993)). Rather, the CWA applies a deferential approach, allowing expert administrators the discretion to implement steps that adequately address a violation. *Bayer*, 964 F. Supp. at 1324. Thus, the *Bayer* court found that a state agency's requirement of monthly and annual reports, as well as monitoring studies and installation of aeration devices constituted diligent prosecution. *Id.* Although remediation of the site was slow, progress was made and the state agency was trying diligently to enforce against and remediate violations. *Id.* In this case, however, New Union's actions fail to rise to the same level of diligence. New Union only required that Goldthumb allow it to inspect the ponds and observe any discharges. R. at 5. These inspections do not compare to the monthly or annual reports in *Bayer*, nor do they provide the opportunity to monitor or study the chemicals that are accumulating in the Arroyo. Accordingly, New Union's actions do not constitute diligent prosecution.

3. The Severity of the Penalty Assessed by New Union Against the Economic Benefits Received by Goldthumb was Not Considered by the District Court and Must be Examined on Remand to Determine Whether New Union's Actions Constitute Diligent Prosecution

"The mere fact that settlement reached by the state is less burdensome to the defendant than the remedy sought in the complaint. . .does not establish that the state failed to prosecute its action diligently." *Laidlaw*, 890 F. Supp. at 490. However, where there is a lack of substantial relief in a settlement, the court can properly consider and determine whether the state action was diligently prosecuted. *Id.* "A lenient penalty that is far less than the

maximum penalty may provide evidence of non-diligent prosecution." *Id.* at 491. Thus, in *Laidlaw*, where the state agency should have sought a penalty as high as $2.2 million, but ultimately agreed to $100,000, the court found that the agency "failed to recover, or even calculate, the economic benefit that [the polluter] received by not complying with its permit." *Id.* at 491. Similarly, in *Union Oil*, the corporate polluter paid $780,000, representing only a portion of the total payment of $2 million. 83 F.3d at 1114. The Ninth Circuit noted that "no formal scrutiny [was made] of the economic benefits to [Union Oil] of non-compliance and thus no assurance [was given] that [Union Oil] has fully disgorged the benefit it receives from violating effluent standards." *Id.* at 1116. Likewise, in this case, the fact that New Union assessed no monetary penalty against Goldthumb militates against a finding of diligent prosecution and requires this Court to remand the case for the determination of the benefits received by Goldthumb for not properly disposing of its contaminated wastewater.

V. UNDER SECTION 309(G)(6) OF THE CWA, A STATE PENALTY ASSESSMENT MAY BAR THE EPA FROM ISSUING A SIMILAR ASSESSMENT, BUT IT DOES NOT BAR THE EPA FROM SEEKING INJUNCTIVE RELIEF

The district court erred by holding that 33 U.S.C. § 1319(g) bars the EPA from maintaining actions for all types of relief, including injunctions, when a state is already enforcing against the violation. Even if this Court determines that New Union is diligently prosecuting Goldthumb's violation under a comparable state program or that New Union assessed a penalty under comparable state law, then, at most, §§ 1319(g)(6)(A)(ii) and (iii) only bar the EPA from seeking civil penalties. These statutory provisions do not bar the EPA from instituting a civil action for injunctive relief.

A. The Plain Language of Section 309(g) of the CWA does Not Affect the EPA's Right to Seek Injunctive Relief Under Sections 309(a) and (b) of the CWA

The plain language of § 1319(g)(6)(A) prevents the EPA from seeking civil penalty actions when a state is diligently prosecuting and when the violator has been assessed a penalty under comparable state law. 33 U.S.C. §§ 1319(g)(6)(A)(ii), (iii). These subsections speak solely to civil penalties providing, that where the

statutory bars apply, the violation "shall not be the subject of a *civil penalty action under subsection (d)* of this section or [§ 1321(b)] or [§ 1365] of this Act." 33 U.S.C. § 1319(g)(6)(A) (emphasis added).

By specifying one particular type of the many types of relief available under the entire CWA *and naming the applicable subsection*, Congress unambiguously intended to bar only the relief specified—"civil penalty action under subsection (d)." 33 U.S.C. § 1319(d) (limiting civil penalties to a monetary payment not to exceed $25,000 per day for each violation). If Congress intended the bar to apply to other forms of relief, it would have explicitly identified injunctive and declaratory relief. Congress's specificity in limiting subsection (d) to monetary penalty limits demonstrates its intent to impose the bar only to civil monetary penalties.[12]

The Supreme Court has already invoked a similar interpretation of CWA § 309(g) in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987). When analyzing whether citizens may sue to recover civil penalties for wholly past violations, the *Gwaltney* Court emphasized the dissimilarity between the statutory constructions of § 1319, which deals with federal enforcement, and § 1365, which deals with citizen suits. *Id.* at 58-59. It recognized that § 1365(a) authorizes civil penalties and injunctive relief in the same sentence, whereas § 1319 separates the federal government's enforcement authority in different subsections:

> [§ 1319] does not intertwine equitable relief with the imposition of civil penalties. Instead each kind of relief is separably authorized in a separate and distinct statutory provision. Subsection (b), providing injunctive relief, is independent of subsection (d), which provides only for civil penalties.

Id. at 58 (quotation marks omitted) (alteration in original) (quoting *Tull v. United States*, 481 U.S. 412, 425 (1987)). This contrast formed the basis for the Court's denial of citizen suits for wholly past violations, even though the EPA could still maintain an action. The Court's conclusions of statutory interpretation—that § 1319 treats types of relief separately and that subsection (b) acts

12. In fact, a stricter reading of the subsection suggests that (when a state is diligently prosecuting) the EPA is only barred from seeking a penalty *in court*, not from assessing administrative penalties. However, congressional intent does not support such a narrow interpretation because that would defeat the purpose behind barring civil penalties. *See infra* Argument Section V.B.

independently of subsection (d)—is binding precedent and must be applied to the case at hand. Since the § 1319(g)(6)(A) bar only identifies "civil penalty action under subsection (d)," it does not have any effect upon the injunctive relief authorized in subsection (b). The blatant absence of any mention of compliance orders or civil actions for a permanent or temporary injunction in § 1319(g)(6)(A) means that these forms of relief are still available to the EPA despite being unavailable to citizen-plaintiffs.

Furthermore, subsections (ii) and (iii) are *exceptions* to the general rule that section (g) does not limit the EPA's other authority throughout the Act. Thus, the EPA's authority under § 1319(g)(6)(A) would be meaningless if subsections (ii) and (iii) were interpreted to limit injunctive relief as well. If the bar encompassed all of the EPA's forms of relief, there would be no need for these "exceptions."

B. Allowing the EPA to Maintain an Action for Injunctive Relief Against Goldthumb is Not Duplicative of New Union's Enforcement, but Well Within the Supplemental Authority Congress Intended for the Federal Agency

Congress included the 33 U.S.C. § 1319(g)(6)(A) bar to prevent duplicative penalty assessments, which have undue harsh effects upon defendants without furthering the stated goals of the CWA. The district court relied heavily upon *Scituate*, 949 F. 2d 552, for its broad interpretation of the § 1319(g)(6)(A) bar. In *Scituate*, the Supreme Court "conclude[d] that even injunctive relief is foreclosed by a state's administrative compliance action, despite the fact that [§] 1319(g)(6)(A) bars only 'civil penalty' actions." *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1346 (D.N.M. 1995). "Duplicative actions aimed at exacting financial penalties in the name of environmental protection at a time when remedial measures are well underway do not further the CWA's goal of restoring and maintaining the integrity of the nation's waters. They are, in fact, impediments to environmental remedy efforts." *Scituate*, 949 F. 2d at 556.

Although lower courts have adhered to the literal reading of § 1319(g)(6)(A) and daringly rejected *Scituate*, *see Orange Envt., Inc. v. County of Orange*, 860 F. Supp. 1003, 1018 (S.D.N.Y. 1994) (rejecting the *Scituate* holding as to injunctive relief and ruling that section 1319(g) bars only civil penalties); *Coalition for a Livable W. Side, Inc. v. New York City Dep't of Envtl. Prot.*, 830 F.

Supp. 194, 196 (S.D.N.Y. 1993), in the case before this Court, holding in favor of the EPA would not entail the same irreverence for precedent. *Scituate* is distinguishable. In *Scituate*, the Massachusetts Department of Environmental Protection issued an administrative order, in which the town was prohibited from adding any new connections to its sewer system and compelled to construct new wastewater treatment facilities along with extensive upgrading of the current facility. 949 F. 2d at 553-54. Allowing the supplemental enforcer, the citizen-plaintiff, to bring suit for civil penalties, as well as declaratory and injunctive relief, would have been unnecessarily duplicative and interfere with the state's enforcement, especially when the record revealed that the town had made substantial efforts to comply with the order. *Id.* at 556-8. Thus, the facts in *Scituate* justified a broad reading of the § 1319(g)(6)(A) bar.

By contrast, the current case is bereft of a comparable record to support such an expansive reading of the § 1319(g)(6)(A). New Union's administrative order is a far cry from the injunctive nature of the Massachusetts administrative order in *Scituate*. Where the *Scituate* order was ultimately geared at bringing the pollution to a halt, Id. at 553, the New Union order constitutes nothing more than mere "hand holding," and allows Goldthumb to continue discharging pollutants into the Arroyo while in the presence of an on-site inspector. The *Scituate* court did not contemplate this particular situation when it incorporated injunctive relief into the § 1319(g)(6)(A) bar. The case at hand is one that proves Congress's intent to exclude other forms of relief from the stated bar on civil penalties. *See* H.R. Conf. Rep. No. 99-1004, at 133 (1986) (stating that "[t]his limitation would not apply to . . . an action seeking relief other than civil penalties (e.g. an injunction or declaratory judgment")). Allowing the EPA to maintain an action for injunctive relief against Goldthumb is not duplicative, but within the federal agency's full authority "to restore and maintain the chemical, physical, and biological integrity of the nation's waters," 33 U.S.C. § 1251(a), where New Union falls short. Civil penalties would not further the goals of the CWA, whereas injunctive relief would enable the ultimate goal of the CWA—stopping pollution of the nation's waters.

Thus, the EPA's action would not supplant, but rather supplement New Union's enforcement as Congress intended. New Union has already declared that it would issue a similar compliance order in the future, which suggests that the state does not plan to

fortify its current level of enforcement. Despite Goldthumb's acquiescence to the state's orders, the EPA cannot be barred from its own enforcement of the CWA when the state's efforts fail to achieve the goal of the CWA. Accordingly, the district court erred by holding that a state penalty assessment prevents EPA from seeking injunctive relief.

CONCLUSION

For the reasons stated in this brief, the United States respectfully requests that this Court reverse the district court's grant of summary judgment in favor of Goldthumb, and remand this case for further proceedings on the merits.

APPENDIX A[13]*

[R.1] 2003 National Environmental Law Moot Court Competition

UNITED STATES COURT OF APPEALS FOR THE TWELTH CIRCUIT

UNITED STATES,
Appellant,

CA No. 02-2003

STATE OF NEW UNION,
Appellant/Appellee,

v.

GOLDTHUMB MINING CO., INC.,
Appellee.

ORDER

The United States brought an enforcement action under § 309 of the federal Clean Water Act, 33 U.S.C. §§ 1251, 1319 (the "CWA") on behalf of the Environmental Protection Agency (EPA), against Goldthumb Mining Co., Inc. ("Goldthumb") for discharges of polluted wastewater from its gold mining operation into the Arroyo d'Oro in the State of New Union. The Arroyo d'Oro is normally a dry riverbed, but after rain it is a flowing stream and on occasion flows from New Union into the State of Progress. When Goldthumb discharged into the Arroyo d'Oro, it was dry. New Union intervened in the action as a plaintiff under CWA § 505, 33 U.S.C. § 1365, but argued that EPA lacked jurisdiction to pursue its enforcement action under CWA § 309(g) because New Union had earlier taken enforcement action against Goldthumb for the same discharges.

Goldthumb filed a motion for summary judgment for lack of subject matter jurisdiction on two grounds. Its first ground was that the CWA does not confer jurisdiction over discharges into the Ar-

13. * Editors Note: Appendix A contains a reproduction of the original hardcopy record. References made in this brief and the other briefs published in this volume refer to page numbers in the original hardcopy record, which can be found in this brief in Appendix A by the symbols [R. 1], [R. 2], [R. 3], etc. which have been inserted into Appendix A by the editorial staff of the Pace Environmental Law Review.

royo d'Oro for two reasons: 1) the CWA exercises jurisdiction only over discharges into "navigable waters" and its definition of "navigable waters" does not include the Arroyo d'Oro when it is dry; and 2) Congress lacks authority under the Constitution to exercise jurisdiction over discharges into the Arroyo d'Oro when it is dry. New Union joined the United States in opposing the motion on these grounds. The District Court granted Goldthumb's motion on the first grounds, although it did not reach the constitutional question. Goldthumb's motion was also based on its argument that CWA § 309(g) deprives EPA of jurisdiction under § 309 to enforce against violations when a state has already enforced against them. New Union argued in **[R. 2]** support of Goldthumb on this part of its motion. The United States opposed this part of the motion, arguing that: 1) only enforcement actions by states with programs approved by EPA to administer the CWA permit program can deprive EPA under § 309(g) from its § 309 jurisdiction to enforce against violations of the CWA, and EPA has not approved New Union's permit program; 2) only enforcement actions by states using authority comparable to § 309(g) can deprive EPA under 309(g) from its § 309 jurisdiction to enforce against violations of the CWA, and New Union did not use enforcement authority against Goldthumb comparable to § 309(g); and 3) if New Union's enforcement action does deprive EPA under § 309(g) from its § 309 jurisdiction to enforce against violations of the CWA, it deprives EPA only of jurisdiction to seek the assessment of penalties and not to seek injunctive relief. The District Court granted the second part of Goldthumb's motion, rejecting all three arguments.

Each party is instructed to brief the following questions:

1. Did the court below err in holding that the CWA's definition of navigable water in CWA § 502, 33 U.S.C. § 1362, does not include the Arroyo d'Oro when it is dry? Goldthumb will file a brief supporting the court's ruling and the United States and New Union will file briefs opposing it.

2. Does Congress have Commerce Clause jurisdiction over dry waterbeds of intermittent interstate streams that do not meet any traditional test of navigability and are not tributary to waters that meet any such test? The United States and New Union will file briefs arguing in favor of such authority; Goldthumb will file a brief opposing it.

3. Did the court below err in holding that enforcement by a state without a permit program approved by EPA under the CWA can prevent EPA enforcement under CWA § 309(g)? Goldthumb and New Union will file briefs supporting the court's ruling and the United States will file a brief opposing it.

4. Did the court below err in holding that a state need not enforce using authority comparable to CWA § 309(g) to prevent EPA enforcement under § 309? Goldthumb and New Union will file briefs supporting the court's ruling and the United States will file a brief opposing it.

5. Did the court below err in holding that a state penalty assessment that prevents EPA penalty assessment under § 309(g) also prevents EPA from seeking injunctive relief? Goldthumb and New Union will file briefs supporting the court's ruling and the United States will file a brief opposing it.

The parties are limited in their briefs to the above issues, but are not limited to the arguments for their positions raised in the district court. For purposes of briefing and argument, legal authorities may be cited that date before September 1, 2002. Authorities dated on or after that date may not be cited or referred to.

Entered September 1, 2002.

[R.3] UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW UNION

UNITED STATES,
Plaintiff,

STATE OF NEW UNION,
Intervenor,

Civ. No. 02-7031

GOLDTHUMB MINING CO., INC.,
Defendant.

ORDER

The United States filed a complaint under § 309 of the Clean Water Act (CWA), 33 U.S.C. § 1319, against Goldthumb Mining Co., Ltd. (Goldthumb), alleging that Goldthumb violated § 301(a) of the CWA, 33 U.S.C. § 1311(a), by discharging cyanide laden wastewater into Arroyo d'Oro, a dry arroyo, without a permit issued under § 402 of the CWA, 33 U.S.C. § 1342. New Union, the state in which the discharge occurred, filed a motion to intervene under CWA § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B) and Fed. R. Civ. P. 24. Over Goldthumb's opposition, the Court granted New Union's motion to intervene. Goldthumb filed a motion for summary judgment against both the United States and New Union on two grounds. First, Goldthumb argues that the United States and New Union lack jurisdiction under CWA §§ 309 and 505 over discharges into Arroyo d'Oro either because it is not navigable water as defined by the statute or because it is not within the interstate commerce authority of Congress to regulate. Both the United States and New Union opposed the motion on this ground. Second, Goldthumb, joined by New Union, argues that this Court lacks jurisdiction over Goldthumb's actions under §§ 309 or 505 of the CWA because § 309(g) bars enforcement actions by EPA and citizens against a violator of the CWA when the state has already taken an enforcement action against the violator and New Union has already taken an enforcement action against Goldthumb. New Union argues that while CWA § 309(g) blocks EPA enforcement, it does not block New Union enforcement, since New Union is the preferred enforcer. New Union explains its apparently inconsistent stances by acknowledging federal authority over Goldthumb's discharge, while insisting that under the CWA the state is the preferred enforcer against water pollution within its

boundaries. It believes that an earlier enforcement action it took against Goldthumb precludes under CWA § 309(g) any EPA enforcement against the company at this time. If New Union is wrong on this contention, it desires to be a plaintiff in this action, even though it does not necessarily think that additional prosecution is warranted. By suing in federal court as a citizen under CWA § 505 rather than as the sovereign in its own court, however, New **[R.4]** Union stands or falls with EPA on both grounds. The Court grants Goldthumb's motion against enforcement by the United States or New Union on both grounds.

The Facts

Goldthumb mines gold in an uninhabited desert portion of New Union. It uses the modern cyanide process, whereby it crushes the gold ore, places the crushed ore on an impermeable pad, drenches the pile with a cyanide bath, which leaches out the gold. Goldthumb collects the spent cyanide bath and stores it in impermeable evaporation ponds, from which in the normal course of events the liquid evaporates more quickly than new spent bath is added to it. Most of the cyanide and heavy metals accumulate in the sludge that builds up on the bottoms of the ponds. When Goldthumb completes its operation, it plans to evaporate all of the liquid from the ponds, leaving the dried sludge contaminated with cyanide and various heavy metals; it will remove and dispose of the sludge in a safe manner. The liquid in the bath is groundwater, which Goldthumb pumps from several hundred feet underground. Goldthumb was careful to make the leaching pad and the evaporation ponds impermeable to prevent contaminants from percolating down to groundwater. The Goldthumb operation employs the most modern mining methods, is very efficient at recovering gold from the ore, and evidently takes care to prevent environmental contamination.

Rainfall at Goldthumb's operation has averaged less than two inches a year since measurements were made in the area, commencing in 1940. Most of the rain falls during "monsoon" season in August. On rare occasions, once every two or three years, rain causes liquid to collect in Goldthumb's evaporation ponds more quickly than it evaporates, thus threatening to overflow the sides of the ponds. If it did overflow, it would rupture the berms forming the sides of the ponds, allowing all of the contents to escape into the Arroyo d'Oro. To prevent this from happening, prior to

the monsoon season Goldthumb drains enough liquid from the pond through a series of pipes into the Arroyo d'Oro to maintain freeboard during the rainy season. Thus Goldthumb bleeds off small amounts of its evaporation pond water into the Arroyo to prevent all of the pond water and the highly contaminated sludge from flowing into the Arroyo. Goldthumb contends that this is a reasonable and responsible way to protect the environment, and it appears to be so. EPA investigations concluded that Goldthumb drained liquid from its ponds into the Arroyo on three days in June of 1999, one day in July of 2000, and two days in July of 2002. For the purposes of its motion for summary judgment Goldthumb admits these activities. Goldthumb also admits that the liquid is acidic and contains cyanide and heavy metals, and that they constitute "pollutants" under the CWA.

The Arroyo d'Oro is completely dry except after a major storm. After a storm, water runs in the Arroyo for a few days. Goldthumb employees testified that they never released pond contents into the Arroyo during or after a storm, but always did so several weeks before storm season when the Arroyo was completely dry. Every two or three years there is a storm event in the vicinity of Goldthumb's operation sufficient to cause water to run in the Arroyo from the operations all the way to the border between New Union and Progress, some thirty-seven miles away, and into Progress, where the water **[R. 5]** dissipates and disappears after another eight or ten miles. Five miles into Progress the Arroyo feeds into a permanent three-acre pool, a sort of desert oasis known as Greenheaven, that Progress protects as a key element in its Greenheaven Wildlife Preserve. The pool is one of three pools, all located in Progress, in which the Greenheaven pupfish is known to survive. The U.S. Department of the Interior has listed the Greenheaven pupfish as an endangered species under the federal Endangered Species Act, 16 U.S.C. §§ 1531 *et seq*.

In April of 2000, the New Union Department of Environmental Protection (NUDEP) issued an administrative order to Goldthumb, prohibiting it from discharging pond liquid into the Arroyo when waters of the state are present in the Arroyo and prohibiting it from discharging pond liquid into the Arroyo at any time without prior permission of the NUDEP. Goldthumb informed the NUDEP that the agency had no authority to prohibit Goldthumb from discharging pond liquid onto dry land, which is

not a water of the state. Goldthumb nevertheless indicated it would not discharge into the Arroyo in the future without informing the NUDEP in advance. In July of 2000, Goldthumb contacted the NUDEP for permission to drain some of the liquid from its ponds to prevent overflow during expected storms. The NUDEP sent an inspector to the site, the inspector found that no water was flowing in the Arroyo, the ponds were in danger of overflowing during the upcoming monsoon season, and gave permission for limited draining into the dry Arroyo. In April of 2001, the NUDEP issued a new administrative order to Goldthumb in similar terms to the earlier order. Goldthumb responded as it had to the earlier order. In July of 2002, Goldthumb contacted the NUDEP for permission to drain some of the liquid from its ponds and the same results ensued. In both cases the inspector remained on-site during the draining, supervised it, and agreed that Goldthumb accomplished it in accordance with the permission given and that no pond liquid entered waters of the state. The NUDEP has informed Goldthumb that it will issue a new administrative order similar to the earlier two orders.

The Law

CWA § 301(a) prohibits the "discharge of any pollutant" without a permit issued under CWA §§ 402 or 404. CWA § 502(12) defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable water from any point source." Goldthumb admits that the liquid from its ponds contain pollutants. The pipes through which it drains the liquid from the ponds to the Arroyo are prototypical point sources, CWA § 502(14). There is no question that when Goldthumb drains the liquid to the Arroyo it adds pollutants to the Arroyo, for they do not naturally occur there and come "from the outside world." *See National Wildlife Federation v. Gorsuch*, 693 F. 2d 156 (D.C. Cir. 1982); *National Wildlife Federation v. Consumers Power Co.*, 862 F. 2d 580 (6th Cir. 1988). Goldthumb has not applied for and has not been issued a permit for this addition. Goldthumb contends it does not require a permit because the Arroyo d'Oro is not navigable water. Whether Goldthumb violated and will continue to violate the CWA thus depends on whether the Arroyo d'Oro is "navigable water." CWA § 502(7) defines "navigable water" to be "the waters of the United States," one of Congress' least helpful definitions.

[R. 6] CWA § 309 provides EPA with authority to enforce against violators of the CWA using a variety of mechanisms, including the assessment of civil penalties and the compliance injunction that it seeks here. Subsection 309(g) authorizes EPA to assess administrative penalties against the violators. Although EPA has chosen not to do so, § 309(g) is nonetheless relevant because § 309(g)(6) provides that EPA may not enforce if a state has already done so. A narrow, literal reading of this subsection would only bar EPA from assessing penalties for violations against which New Union had already assessed penalties. A liberal reading of the subsection to effectuate the statute's purpose of allowing states to take the lead in addressing water pollution problems, would bar EPA from any enforcement of violations against which New Union had already enforced. As we will see, the courts split on this issue.

CWA § 505 provides citizens with authority to enforce against violations of the statute, seeking both the assessment of civil penalties and compliance injunctions, "except as provided in . . . section [309(g)(6)]." Thus the authority of citizens to sue for violations of the CWA is also constrained by how § 309(g) applies. The statute defines a "citizen" to be a "person," § 505(g), and defines a "person" to include a "State." CWA § 502(5), 33 U.S.C. § 1362(5).

Under the law of New Union the "addition of any pollutant from any source to the waters of the State" is prohibited without a state issued permit. 50 N.U.R.S. § 28(a). The state statute gives the NUDEP authority to enforce against violations of its water pollution requirements in a variety of ways, including injunctive relief, civil penalties and administratively assessed penalties. The NUDEP's administrative assessment authority is a virtual clone of CWA § 309(g). The New Union statute does not authorize citizen suits. The state statute follows the CWA in all other material respects. Indeed, EPA has repeatedly urged New Union to apply for approval of its permit program and repeatedly informed New Union that EPA would approve its program, if submitted.

EPA's Definition of Navigable Water

Congress grounded its constitutional authority to enact the CWA on its power to regulate interstate and foreign commerce under Art. I, sec. 8 of the Constitution. Indeed, it intended to regulate water pollution to the full extent of its Commerce Clause

power. S. CONF. REP. NO. 92-1236, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3776, 3822. This intent, of course, carries with it the recognition that its authority to regulate water pollution under the Commerce Clause is limited and that the jurisdiction of the CWA may not exceed that limit. The Court in *Solid Waste Agency of Northern Cook County v. United Stats Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2000), has recently reiterated that authority is limited and interpreted "navigable waters" not to include isolated wetlands to avoid considering whether applying the CWA to such waters would exceed Congress' Commerce Clause jurisdiction.

Because waterways were important highways of interstate commerce from the beginning of the country, the courts have long recognized federal Commerce Clause **[R. 7]** jurisdiction over navigable waters. But that jurisdiction depended on the waters being historically used for interstate commerce or at least susceptible for use in interstate commerce with feasible improvements. *The Propeller Genesee v. Fitzhugh,* 53 U.S. 443 (1851); *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870). The Supreme Court has recognized that pollution of navigable waterways may interfere with interstate commerce and thus Congress may act to prevent water pollution from interfering with interstate commerce. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). It flows from this that Congress may regulate the pollution of tributaries of navigable water, for pollution of navigable waters may not otherwise be prevented.

EPA does not allege here that Arroyo d'Oro has ever been used for interstate commerce, is susceptible for use in interstate commerce with feasible improvements, or is a tributary of navigable water. EPA alleges the Arroyo is navigable because it is an interstate waterway. Indeed, EPA defines "navigable water" to include interstate waterways. 40 C.F.R. § 122.2 (2001). But while "interstate waterways" share "interstate" with "interstate commerce," unless they have some connection with commerce, they are not within Congress' Commerce Clause jurisdiction to regulate. We needn't address whether Congress has exceeded its constitutional authority or whether EPA's regulations have done so by including within regulated waters intermittent interstate streams, with no connection to traditionally navigable waters. Instead, we address whether the Arroyo d'Oro is within EPA's regulatory definition of navigable water when the Arroyo is dry.

There is no question that EPA interprets "navigable water" to include the Arroyo d'Oro, even when it is dry. This enforcement action is evidence enough of that. Moreover, EPA's interpretation in this regard is longstanding, *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181 (D. Ariz. 1975). Other courts have recognized that discharges to intermittent streams may violate the CWA. *Sierra Club v. Quivira Mining Co.*, 765 F.2d 126 (10th Cir. 1985). In its regulations EPA defines "navigable waters" to include "intermittent streams" and "playa lakes," the latter, of course, being intermittent lakes. 40 C.F.R. § 122.2 (2001). What EPA's regulations and the case law do not address is whether intermittent streams are considered navigable water when they are dry or only when they are wet. The cited decisions appear to address continuing pollution into arroyos both when the arroyos are dry and when they are wet and are tributaries of navigable water. Goldthumb, however, discharges its liquid to the Arroyo only when it is dry and is not a waterway at all. The Supreme Court has held that wetlands, in that case intermittent swamps, are within the CWA's definition of navigable water and within Commerce Clause jurisdiction when they are adjacent to navigable waters, but it did not address whether they are within the definition of navigable water or Commerce Clause jurisdiction when they are dry, as opposed to when they are wet. *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985).

In *SWANCC* the Court held that there had to be some indicia of navigability for water to be considered navigable. 531 U.S. at 682-83. But, of course, in that case, the Court was dealing with permanent bodies of water. Here we are dealing with an arroyo that is bone-dry desert most of the time and wet a few times a year. It boggles the **[R. 8]** imagination to say that bone-dry desert is water, let alone navigable. I hold that EPA's inclusion of intermittent bodies of water within its definition of navigable waters means that they are navigable waters only when they are bodies of water, not when they are dry land. Were I to hold otherwise, I would have to determine whether Congress had authority under the interstate Commerce Clause to regulate the discharge of pollution into an interstate body of water that had no connection with interstate commerce. But, of course, it is axiomatic that courts must interpret statutes to avoid constitutional challenges to the statutes.

The United States contends that the cyanide and heavy metals in Goldthumb's wastes, when washed down the Arroyo to Greenheaven Pool, imperil the Greenheaven pupfish that Progress is protecting in its Wildlife Sanctuary. The three-acre Greenheaven Pool is no more navigable water than the gravel pit ponds in *SWANCC*. The pupfish are not items of interstate commerce, indeed, as *ferea naturae*, they are creatures of the state. If the citizens of Progress see fit to spend their tax dollars prolonging for a few generations the ultimate extinction of an otherwise unremarkable species, that may be altruistic and laudable. But it does not transform a state's activity to interstate commerce or dry land into water.

CWA § 309(g): Cooperative Federalism

The CWA is an exercise of what is often called "cooperative federalism." Although the exact meaning of this term is nowhere defined, it appears to refer to differing combinations of actions taken by the federal and state governments to solve mutual problems. It takes several forms in the CWA. EPA develops technology-based standards to be applied to point sources of pollution nationally. CWA §§ 301, 304, 33 U.S.C. §§ 1311, 1314. States develop water quality criteria to protect uses they designate for waters within their jurisdictions. CWA § 303, 33 U.S.C. § 1313. EPA or states with EPA approved programs issue permits to translate both the technology based standards and the water quality measures into individual requirement that each point source must meet. CWA § 402, 33 U.S.C. § 1342. When EPA issues permits, it must include in them state requirements that states certify are more stringent than the federal requirements. CWA § 401, 33 U.S.C. § 1341. EPA may enforce against violations of the CWA. CWA § 309, 33 U.S.C. § 1319. States may enforce against violations of the CWA in federal court under the CWA's citizen suit provision, CWA § 505, 33 U.S.C. § 1365, or in state court, for the CWA is the supreme law of the land. *Davis v. Sun Oil Co.*, 148 F. 3d 606 (6th Cir. 1998); *Hudson Riverkeeper Fund, Inc. v. Harbor at Hastings Associates, PC*, 917 F. Supp. 251 (S.D.N.Y. 1996); *Citizens Legal Environmental Network, Inc. v. Premium Standard Farms, Inc.*, 2000 WL 220464 (W.D. Mo.). Because the CWA does not preempt state regulation of water pollution unless it interferes with the federal statute, states may also enforce against violations of their own water pollution law in state courts. CWA § 510, 33 U.S.C. § 1370. Indeed, Congress stated at the outset of the statute

that it "is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." CWA § 101(b), 33 U.S.C. § 1251(b).

[R. 9]When it came to enforcement, Congress intended that states assume responsibility and that EPA serve only a supplementary role. The Senate Committee Report accompanying the enactment of the CWA could not have been more explicit in this regard:

> The Committee does not intend that this jurisdiction of the Federal government so supplant state enforcement. Rather the Committee intends that the enforcement power of the Federal government is available in cases where States . . . are not acting expeditiously and vigorously to enforce control requirements.
>
> The Committee intends the great volume of enforcement actions be brought by the state. It is clear that the Administrator is not to establish an enforcement bureaucracy but rather to reserve his authority for the cases of paramount interest.

S. REP. NO. 92-414, at 73-74 (1972), *reprinted in* LEGISLATIVE HISTORY OF THE CLEAN WATER ACT, at 1481-82 (1973). Thus Congress intended that federal enforcement not supplant state enforcement. It also intended that citizen enforcement not supplant government enforcement. The Court used this as a reason to interpret narrowly the jurisdiction of the CWA's citizen suit provision, when a broad interpretation could threaten citizen enforcement supplanting government enforcement. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 494 U.S. 49, 60 (1987).

That brings us to § 309(g). It quite clearly reflects and implements Congress' intent that states perform the primary role in enforcement and that EPA and citizens perform supplementary roles. It raises the bar against citizen enforcement if a citizen has commenced suit before EPA commences an action, but not if a state has commenced an action or, under some circumstances even if a citizen has given notice of suit before EPA commences an action, but not if a state has commenced an action. § 309(g)(6)(B). The provision states that EPA enforcement actions do not negate the obligation of violators to comply with the CWA, § 309(g)(7), but does not say the same for state enforcement actions. Other courts have commented that these provisions appear to give the states a

primary position in enforcement, but have assumed that was the result of inadvertence. Those courts neglected to note that state primacy in enforcement is consistent with Congress' intent in enacting the CWA initially.

EPA attempts to side-step the effect of the § 309(g) bar by contending that it only applies if states with approved permit programs take an enforcement action. EPA has made this argument before, to no avail. *North and South Rivers Watershed Assn. v. Town of Scituate*, 949 F.2d 552, 556 n.3 (1st Cir. 1992). While the argument has superficial appeal, it is not consistent with the wording or structure of the statute. The CWA defines "state" generally in the statute to include all of the states, not just those with approved programs. CWA § 502(3), 33 U.S.C. § 1362(3). Congress knew how to vary the meaning of general definitions in particular sections, as it has by modifying the general definition of "person" in § 502(3) to include, for purposes of § 309©, responsible corporate officers. CWA § 309©(6), 33 U.S.C. § 1319©(6). Congress did not modify the general definition of "state" to mean only states with approved permit programs for **[R. 10]** purposes of § 309 or § 309(g). New Union is a state and, even though EPA has not approved its program for permit issuance, New Union's enforcement actions have the same force and effect under § 309(g) as enforcement actions of states with approved permit programs.

EPA next points out that a literal reading of § 309(g)(6)(A) is that violations against which a state assesses a penalty shall not be subject to a penalty action by EPA. This, EPA argues, allows it to seek an injunction against such violations, even if the state has assessed a penalty against them. *Coalition for a Livable West Side v. New York City Department of Environmental Protection*, 830 F. Supp. 194 (S.D.N.Y. 1993). It also argues that only state actions taken under state law "comparable" to § 309(g) bar EPA action. CWA §§ 309(g)(6)(A)(ii), (iii). This, EPA argues, requires that NUDEP assess a penalty before EPA is precluded from enforcement and NUDEP has not done that. *Citizens for a Better Environment v. Union Oil Company of California, Inc.*, 83 F.3d 1111 (9th Cir. 1996). EPA admits that the New Union statute grants the NUDEP authority to assess administrative penalties that is comparable to § 309(g). But, EPA argues, because the NUDEP has chosen to use other authority to issue a compliance order, the § 309(g) bar does not operate. While some courts support EPA's arguments, the better line of precedent begins with *North and*

South Rivers Watershed Ass'n v. Town of Scituate, 949 F.2d at 556-558. *Scituate* has been widely followed. *See, e.g., Arkansas Wildlife Federation v. ICI Americas, Inc.*, 29 F.3d 376, 383 (8th Cir. 1994) (different reasoning, same conclusion); *U. S. v. Smithfield Foods Co.*, 965 F. Supp. 769, 792 (E.D. Va. 1997), *aff'd on other grounds*, 191 F. 3d 516 (4th Cir. 1999); *Williams Pipe Line v. Bayer Corp.*, 964 F. Supp. 1300 (S.D. Iowa 1995). *Scituate* builds directly on the Court's holding in *Gwaltney* that the CWA should be interpreted to prevent a primary enforcer from being supplanted by a subordinate enforcer. In *Gwaltney* the primary enforcer was EPA and the subordinate enforcers were citizens. The court found the legislative history made citizens supplemental enforcers to EPA. Here it is the state that is the primary enforcer and EPA that is the subordinate enforcer. The legislative history, quoted above, makes it clear that states are the primary enforcers of the statute and that EPA is merely a supplemental enforcer. Parts of § 309(g) are consistent with this scheme, as discussed two paragraphs above. All of § 309(g) should be interpreted consistently with this scheme.

EPA argues that *Scituate* held that a citizen was barred from suing and is not good precedent for holding that EPA is barred from suing. It argues that in *Gwaltney* the Court recognized that an interpretation of the CWA barring citizen enforcement would not bar EPA enforcement. 484 U.S. at 58. While the distinctions to which EPA draws this Court's attention do exist, they do not help EPA. True, *Scituate* involved a citizen suit, but the same provisions of § 309(g), indeed the very words of § 309(g), barring the citizen suit in *Scituate* also bar EPA actions. The same words cannot mean one thing when applied to citizen suits and another when applied to EPA actions, unless Congress explicitly indicated so, and it did not. True, the Court in *Gwaltney* interpreted similar but different provisions of the CWA differently when they applied to citizen enforcers and EPA. But they were different provisions, while here they are the same provisions. And in *Gwaltney* the Court adopted different interpretations to preserve EPA's primary **[R. 11]** enforcement role in relation to the citizens' supplemental role. Here the interpretation favored by EPA would eliminate the state's primary role relative to EPA's supplemental role. In *Gwaltney* the Court found it of paramount importance to preserve the prosecutorial discretion of the primary enforcer, in that case EPA. *Gwaltney*, 484 U.S. at 60-61. So too here, the paramount

importance is to preserve the prosecutorial discretion of New Union, the primary enforcer.

The NUDEP has enforced against Goldthumb to assure that it does not discharge into the waters of the state and Goldthumb has acquiesced to its actions. The NUDEP enforcement has been effective in controlling Goldthumb's actions to assure that the highly contaminated material in its evaporation ponds to not overflow into the Arroyo during the storm season and that Goldthumb does not release even small amounts of the lightly contaminated liquid from its ponds into the Arroyo when it is flowing. It is doubtful that Goldthumb would have reached its accommodation with the NUDEP if it knew that EPA or citizens could second-guess the enforcement action taken by the state. This is exactly the intent of the 309(g) preclusion.

Conclusion

This Court grants Goldthumb's motion for summary judgment that its discharge of wastewater into the dry Arroyo d'Oro is not subject to the jurisdiction of CWA § 301(a) because the discharge was onto dry land, not within the CWA's definition of navigable water. The Court thus does not need to address Goldthumb's alternative grounds for summary judgment that such discharges are beyond Congress' jurisdiction under the Constitution's Commerce Clause, although the Court has grave doubts on that question. Alternatively, the Court grants Goldthumb's motion for summary judgment that EPA lacks jurisdiction to enforce against Goldthumb's alleged violation of CWA § 301(a), because CWA § 309(g) forecloses the agency's jurisdiction to enforce under § 309 and § 505 against a violation if the state has already enforced against the violation, and the NUDEP has already enforced against the alleged violation.

SO ORDERED.

APPENDIX B

RELEVANT PROVISIONS

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8, cl. 3 (Commerce Clause)

The Congress shall have Power . . .
To regulate Commerce with foreign Nations, and among the several States. . . .

U.S. Const. art. I, § 8, cl. 18 (Necessary and Proper Clause)

The Congress shall have power . . .

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

STATUTES

CLEAN WATER ACT

33 U.S.C. § 1251. Congressional Declaration of Goals and Policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

33 U.S.C. § 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(e) All point discharge source application of effluent limitations

Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

33 U.S.C. § 1314. Information and guidelines

(i) Guidelines for monitoring, reporting, enforcement, funding, personnel, and manpower

The Administrator shall (1) within sixty days after October 18, 1972, promulgate guidelines for the purpose of establishing uniform application forms and other minimum requirements for the acquisition of information from owners and operators of point-sources of discharge subject to any State program under section 1342 of this title, and (2) within sixty days from October 18, 1972, promulgate guidelines establishing the minimum procedural and other elements of any State program under section 1342 of this title, which shall include:

(A) monitoring requirements;

(B) reporting requirements (including procedures to make information available to the public);

(C) enforcement provisions; and

(D) funding, personnel qualifications, and manpower requirements (including a requirement that no board or body which approves permit applications or portions thereof shall include, as a member, any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit).

33 U.S.C. § 1319. Enforcement

(d) Civil penalties; factors considered in determining amount

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, , [FN1] or in a permit issued under section 1344 of this title by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title, and any person

who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(g) Administrative penalties

(6) Effect of order

(A) Limitation on actions under other sections

Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation—

(i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,

(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or

(iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be, shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

33 U.S.C. § 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combina-

tion of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend be-

yond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any conditio of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;A

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging

such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(i)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) Limitations on partial permit program returns and withdrawals.

A State may return to the Administrator administration, [FN1] and the Administrator may withdraw under paragraph (3) of this subsection approval, of—

(A) a State partial permit program approved under subsection (n)(3) of this section only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) of this section only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pur-

suant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

33 U.S.C. § 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

REGULATIONS

33 C.F.R. § 328.3 Definitions.

For the purpose of this regulation these terms are defined as follows:

(a) The term "waters of the United States" means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

(b) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(c) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by

man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

(d) The term "high tide line" means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(e) The term "ordinary high water mark" means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(f) The term "tidal waters" means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

40 C.F.R. § 122.2 Definitions.

The following definitions apply to Parts 122, 123, and 124. Terms not defined in this section have the meaning given by CWA. When a defined term appears in a definition, the defined term is sometimes placed in quotation marks as an aid to readers.

Waters of the United States or waters of the U.S. means:

(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(b) All interstate waters, including interstate "wetlands;"

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

(f) The territorial sea; and

(g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR § 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.] Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act jurisdiction remains with EPA.

Note: At 45 FR 48620, July 21, 1980, the Environmental Protection Agency suspended until further notice in § 122.2, the last sentence, beginning "This exclusion applies ___" in the definition of "Waters of the United States." This revision continues that suspension.

40 C.F.R. § 123.1 Purpose and scope.

(d)(1) Upon approval of a State program, the Administrator shall suspend the issuance of Federal permits for those activities subject to the approved State program. After program approval EPA shall retain jurisdiction over any permits (including general permits) which it has issued unless arrangements have been made with the State in the Memorandum of Agreement for the State to assume responsibility for these permits. Retention of jurisdiction shall include the processing of any permit appeals, modification requests, or variance requests; the conduct of inspections, and the receipt and review of self-monitoring reports. If any permit appeal, modification request or variance request is not finally resolved when the Federally issued permit expires, EPA may, with the consent of the State, retain jurisdiction until the matter is resolved.

(2) The procedures outlined in the preceding paragraph (d)(1) of this section for suspension of permitting authority and transfer of existing permits will also apply when EPA approves an Indian Tribe's application to operate a State program and a State was the authorized permitting authority under § 123.23(b) for activities within the scope of the newly approved program. The authorized State will retain jurisdiction over its existing permits as described in paragraph (d)(1) of this section absent a different arrangement stated in the Memorandum of Agreement executed between EPA and the Tribe.

40 C.F.R. § 123.22 Program description.

Any State that seeks to administer a program under this part shall submit a description of the program it proposes to administer in lieu of the Federal program under State law or under an interstate compact. The program description shall include:

(a) A description in narrative form of the scope, structure, coverage and processes of the State program.

(b) A description (including organization charts) of the organization and structure of the State agency or agencies which will have responsibility for administering the program, including the information listed below. If more than one agency is responsible for administration of a program, each agency must have statewide jurisdiction over a class of activities. The responsibilities of each

agency must be delineated, their procedures for coordination set forth, and an agency may be designated as a "lead agency" to facilitate communications between EPA and the State agencies having program responsibility. If the State proposes to administer a program of greater scope of coverage than is required by Federal law, the information provided under this paragraph shall indicate the resources dedicated to administering the Federally required portion of the program.

(1) A description of the State agency staff who will carry out the State program, including the number, occupations, and general duties of the employees. The State need not submit complete job descriptions for every employee carrying out the State program.

(2) An itemization of the estimated costs of establishing and administering the program for the first two years after approval, including cost of the personnel listed in paragraph (b)(1) of this section, cost of administrative support, and cost of technical support.

(3) An itemization of the sources and amounts of funding, including an estimate of Federal grant money, available to the State Director for the first two years after approval to meet the costs listed in paragraph (b)(2) of this section, identifying any restrictions or limitations upon this funding.

(c) A description of applicable State procedures, including permitting procedures and any State administrative or judicial review procedures;

(d) Copies of the permit form(s), application form(s), and reporting form(s) the State intends to employ in its program. Forms used by States need not be identical to the forms used by EPA but should require the same basic information, except that State NPDES programs are required to use standard Discharge Monitoring Reports (DMR). The State need not provide copies of uniform national forms it intends to use but should note its intention to use such forms.

Note: States are encouraged to use uniform national forms established by the Administrator. If uniform national forms are used, they may be modified to include the State Agency's name, address, logo, and other similar information, as appropriate, in place of EPA's.

(e) A complete description of the State's compliance tracking and enforcement program.

(f) In the case of Indian Tribes eligible under § 123.33(b), if a State has been authorized by EPA to issue permits on the Federal Indian reservation in accordance with § 123.23(b), a description of how responsibility for pending permit applications, existing permits, and supporting files will be transferred from the State to the eligible Indian Tribe. To the maximum extent practicable, this should include a Memorandum of Agreement negotiated between the State and the Indian Tribe addressing the arrangements for such transfer.

40 C.F.R. § 123.24 Memorandum of Agreement with the Regional Administrator.

(a) Any State that seeks to administer a program under this part shall submit a Memorandum of Agreement. The Memorandum of Agreement shall be executed by the State Director and the Regional Administrator and shall become effective when approved by the Administrator. In addition to meeting the requirements of paragraph (b) of this section, the Memorandum of Agreement may include other terms, conditions, or agreements consistent with this Part and relevant to the administration and enforcement of the State's regulatory program. The Administrator shall not approve any Memorandum of Agreement which contains provisions which restrict EPA's statutory oversight responsibility.

(b) The Memorandum of Agreement shall include the following:

(1)(i) Provisions for the prompt transfer from EPA to the State of pending permit applications and any other information relevant to program operation not already in the possession of the State Director (e.g., support files for permit issuance, compliance reports, etc.). If existing permits are transferred from EPA to the State for administration, the Memorandum of Agreement shall contain provisions specifying a procedure for transferring the administration of these permits. If a State lacks the authority to directly administer permits issued by the Federal government, a procedure may be established to transfer responsibility for these permits.

Note: For example, EPA and the State and the permittee could agree that the State would issue a permit(s) identical to the outstanding Federal permit which would simultaneously be terminated.

(ii) Where a State has been authorized by EPA to issue permits in accordance with § 123.23(b) on the Federal Indian reservation of the Indian Tribe seeking program approval, provisions describing how the transfer of pending permit applications, permits, and any other information relevant to the program operation not already in the possession of the Indian Tribe (support files for permit issuance, compliance reports, etc.) will be accomplished.

(2) Provisions specifying classes and categories of permit applications, draft permits, and proposed permits that the State will send to the Regional Administrator for review, comment and, where applicable, objection.

(3) Provisions specifying the frequency and content of reports, documents and other information which the State is required to submit to EPA. The State shall allow EPA to routinely review State records, reports, and files relevant to the administration and enforcement of the approved program. State reports may be combined with grant reports where appropriate. These procedures shall implement the requirements of § 123.43.

(4) Provisions on the State's compliance monitoring and enforcement program, including:

(i) Provisions for coordination of compliance monitoring activities by the State and by EPA. These may specify the basis on which the Regional Administrator will select facilities or activities within the State for EPA inspection. The Regional Administrator will normally notify the State at least 7 days before any such inspection; and

(ii) Procedures to assure coordination of enforcement activities.

(5) When appropriate, provisions for joint processing of permits by the State and EPA for facilities or activities which require permits from both EPA and the State under different programs. (See § 124.4.)

Note: To promote efficiency and to avoid duplication and inconsistency, States are encouraged to enter into joint processing agreements with EPA for permit issuance. Likewise, States are encouraged (but not required) to considered steps to coordinate or consolidate their own permit programs and activities.

(6) Provisions for modification of the Memorandum of Agreement in accordance with this part.

(c) The Memorandum of Agreement, the annual program grant and the State/EPA Agreement should be consistent. If the State/EPA Agreement indicates that a change is needed in the Memorandum of Agreement, the Memorandum of Agreement may be amended through the procedures set forth in this part. The State/EPA Agreement may not override the Memorandum of Agreement.

Note: Detailed program priorities and specific arrangements for EPA support of the State program will change and are therefore more appropriately negotiated in the context of annual agreements rather than in the MOA. However, it may still be appropriate to specify in the MOA the basis for such detailed agreements, e.g., a provision in the MOA specifying that EPA will select facilities in the State for inspection annually as part of the State/EPA agreement.

(d) The Memorandum of Agreement shall also specify the extent to which EPA will waive its right to review, object to, or comment upon State-issued permits under sections 402(d)(3), (e) or (f) of CWA. While the Regional Administrator and the State may agree to waive EPA review of certain "classes or categories" of permits, no waiver of review may be granted for the following classes or categories:

(1) Discharges into the territorial sea;

(2) Discharges which may affect the waters of a State other than the one in which the discharge originates;

(3) Discharges proposed to be regulated by general permits (see § 122.28);

(4) Discharges from publicly owned treatment works with a daily average discharge exceeding 1 million gallons per day;

(5) Discharges of uncontaminated cooling water with a daily average discharge exceeding 500 million gallons per day;

(6) Discharges from any major discharger or from any discharger within any of the 21 industrial categories listed in Appendix A to Part 122;

(7) Discharges from other sources with a daily average discharge exceeding 0.5 (one-half) million gallons per day, except

that EPA review of permits for discharges of non-process wastewater may be waived regardless of flow.

(e) Whenever a waiver is granted under paragraph (d) of this section, the Memorandum of Agreement shall contain:

(1) A statement that the Regional Administrator retains the right to terminate the waiver as to future permit actions, in whole or in part, at any time by sending the State Director written notice of termination; and

(2) A statement that the State shall supply EPA with copies of final permits.

40 C.F.R. § 123.61 Approval process.

(a) After determining that a State program submission is complete, EPA shall publish notice of the State's application in the FEDERAL REGISTER, and in enough of the largest newspapers in the State to attract statewide attention, and shall mail notice to persons known to be interested in such matters, including all persons on appropriate State and EPA mailing lists and all permit holders and applicants within the State. The notice shall:

(1) Provide a comment period of not less than 45 days during which interested members of the public may express their views on the State program;

(2) Provide for a public hearing within the State to be held no less than 30 days after notice is published in the FEDERAL REGISTER;

(3) Indicate the cost of obtaining a copy of the State's submission;

(4) Indicate where and when the State's submission may be reviewed by the public;

(5) Indicate whom an interested member of the public should contact with any questions; and

(6) Briefly outline the fundamental aspects of the State's proposed program, and the process for EPA review and decision.

(d) If the Administrator disapproves the State program he or she shall notify the State of the reasons for disapproval and of any revisions or modifications to the State program which are necessary to obtain approval.